

1-1-1996

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Recommended Citation

Elizabeth A.R. Yee, Comment, *Hong Kong and China in 1997: An Examination of Possible Legal and Economic Implications for United States Businesses*, 36 SANTA CLARA L. REV. 595 (1996).

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HONG KONG AND CHINA IN 1997: AN EXAMINATION OF POSSIBLE LEGAL AND ECONOMIC IMPLICATIONS FOR UNITED STATES BUSINESSES

I. INTRODUCTION

Perhaps the best example of [free trade] is Hong Kong. . . . Hong Kong has no tariffs or other restraints on international trade. . . . It has no government direction of economic activity, no minimum wage laws, no fixing of prices. The residents are free to buy from whom they want, to sell to whom they want, to hire whom they want, to work for whom they want.¹

As trade in Asia booms, the world increasingly turns to the Pacific Rim as a source of investment and trade growth.² While many rapid changes are taking place in the Asian economies, concern about the fate of Hong Kong, long called the "Pearl of the Orient" because of its strategic location, burgeoning trade, and luxurious lifestyle, increases as 1997 grows closer.³ As Great Britain and China agreed in the 1984 Joint Declaration,⁴ Hong Kong will cede to China in 1997 after ninety-nine years of British rule.⁵ In addition to the disappearance of British rule, the security of having Hong Kong as a trading partner governed by common law and free trade policies has begun to dissipate, and uncertainties regarding international agreements and trade policies have surfaced.⁶ Many questions and concerns for American businesses have therefore arisen.

1. University of Hong Kong Law Professor Peter Rhodes, Address at the University of Hong Kong (June 20, 1994) (quoting Milton Freidman).

2. Bill Saporito, *The World's Best Cities for Business*, FORTUNE, Nov. 14, 1994, at 113.

3. *Id.*

4. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong [hereinafter Joint Declaration], Sept. 26, 1984, U.K.-P.R.C.

5. IAN KELLY, HONG KONG: A POLITICAL-GEOGRAPHIC ANALYSIS 38 (1986).

6. Eric Ellis, *Hong Kong: Economists Forecast Gloom in 1997*, AUSTL. FIN. REV., Mar. 23, 1995, available in LEXIS, Asiapc Library, Curnws File.

Hong Kong is currently one of the major trade centers of the world, and its strategic location makes it a vital center for future trade in Asia.⁷ As foreign investment increases, and as the United States uses Hong Kong as the pivotal port into the rest of Asia and the emerging Chinese market, its stability as a trade center becomes an important issue.⁸ Hong Kong "offers unique access to the planet's fastest-growing economy and biggest potential market, China."⁹ Adding to the complexity of the post-1997 trade problem is Hong Kong's ascension to membership in the General Agreement on Trade and Tariffs (hereinafter GATT) in April 1986,¹⁰ and China's current inability to gain membership status.¹¹

The big question is: what will happen in 1997?¹² Whatever does happen will heavily influence how the United States continues to do business in both Hong Kong and China. American businesses presently entering into contracts with Hong Kong enjoy the benefits of consistent adjudication of disputes and enforcement of judgments under British law.¹³ The year 1997 brings with it not only a completely untested body of law with which the United States must contend, but also its interaction with the laws of the country that governs it.¹⁴ Upon close examination, this law in effect delegates to China the authority to make a final decision with

7. Saporito, *supra* note 2, at 113.

8. In fact, *Fortune* magazine recently rated Hong Kong the top city in which to do business. *Id.* It cited its few tariffs, dynamic location, and remarkable ability to balance its budget as reasons for this distinction. *Id.* In addition, it deemed Hong Kong as the gateway to trade for most major Asian cities. *Id.*

9. *Id.*

10. See discussion *infra* part II.E.2.

11. See discussion *infra* part II.E.3.

12. Santa Clara University School of Law Professor Anna Han explores the possible problems associated with the Joint Declaration in conjunction with Chinese law and policy. Anna Han, *Hong Kong's Basic Law: The Path to 1997, Paved with Pitfalls*, 16 HASTINGS INT'L & COMP. L. REV. 321 (1993). Professor Han's analysis suggests that Hong Kong may not be able to maintain its independence as an economic decision maker. *Id.* at 322. Since Hong Kong's foreign affairs will be decided in accordance with Chinese Basic Law, it is likely that "Hong Kong's interest will probably be subverted." *Id.* at 341.

13. See *infra* notes 68-69.

14. THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA [hereinafter BASIC LAW] (effective July 1, 1997) (P.R.C.). Although the United States presently trades with China and is familiar with its trade laws, Basic Law is more problematic because it actually represents an integration of Chinese law and common law — ideas which are quite contradictory. See discussion *infra* parts IV.A.1, IV.C.

respect to virtually every issue China deems important to uphold the Chinese Constitution.¹⁵

If Hong Kong is to remain autonomous, why is China so important in this discussion? Evidence already exists that China's political and economic environment heavily influence confidence in Hong Kong markets.¹⁶

This comment examines the dynamics of interaction between Hong Kong and China that can affect American businesses currently investing in Hong Kong, or those businesses that are about to embark on a venture in Hong Kong.¹⁷ This comment seeks to elicit possible problems that United States businesses may encounter in post-1997 trade with Hong Kong,¹⁸ and to offer proposals regarding how the United States can safeguard its business interests.¹⁹ As a final perspective, this comment will discuss Hong Kong's role in the trade market as a member of the newly created World Trade Organization [hereinafter WTO], which seeks to strengthen enforcement of GATT judgments.²⁰

15. The Joint Declaration provides that Hong Kong SAR "shall maintain the economic and trade systems previously practiced in Hong Kong [and] decide its economic and trade policies on its own." Joint Declaration, *supra* note 4, annex I, VI. For purposes of clarity, Hong Kong prior to 1997 will be denoted "Hong Kong" and post-1997 Hong Kong will be denoted "Hong Kong SAR." The Joint Declaration also explicitly provides that the Central People's Government will have the final say on international agreements. Joint Declaration, *supra* note 4, annex I, XI. These laws conflict. See discussion *infra* part IV.A.

16. *Weighing Hong Kong's Future*, ECONOMIST, June 6, 1992, at 84. For example, foreign investment in manufacturing rose only 14% from 1989 to 1990, while in previous years it showed an average increase of 24%. *Id.* In addition, production leveled off from 1989 to 1990. *Id.* Even tourism dropped by 4.1% from 1989 to 1990. *Hong Kong Country Profile*, Walden Publishing, Jan. 20, 1993, available in LEXIS, Asiapc Library, Profil File. The following year, it rose again. *Id.*

A current example is the pending United States trade war with China, in which Hong Kong urged the United States to "take into account others who will suffer if trade sanctions are carried out." *Hong Kong Officials Concerned Over Growing U.S.-China Tensions*, Daily Report for Executives, Feb. 8, 1995, available in LEXIS, Legnew Library, Curnws File. Hong Kong estimated that trade sanctions against China would cost Hong Kong \$470 million in annual lost re-export trade, and could potentially affect up to 4000 jobs. *Id.* Hong Kong's greatest fears lay in the "long term fallout from reduced investor confidence" if the United States and China fail to settle this latest trade dispute. *Id.*

17. This comment will also address the United States-China trade relationship because, as will be discussed below, this aspect of the interaction is relevant to the United States' dealings with Hong Kong.

18. See discussion *infra* part IV.

19. See discussion *infra* part V.

20. See discussion *infra* part IV.E.1.

In order to set the stage for discussion of the problems that may confront the United States and Hong Kong in business, part II first explains how Hong Kong will theoretically function post-1997 according to both the Joint Declaration,²¹ which establishes Hong Kong's return to Chinese sovereignty, and the Basic Law, which will govern the scope and power of Hong Kong's judicial, executive, and legislative bodies.²² This comment then examines China's legal system with respect to legislative, executive, and judicial bodies, and political overtones.²³ A brief discussion of GATT and its dispute resolution process offers an additional perspective on the interaction difficulties.²⁴ Part IV analyzes the complications United States businesses may encounter on account of these factors.²⁵ Finally, in part V, several proposals are made regarding how the United States may prepare for 1997 in the face of the unpredictability and uncertainty that surround the relationship between Hong Kong and China.²⁶

A theme recurring throughout this comment is the paradoxical nature of China's socialist government, its drive to ascend to a free market economy, and its desire to maintain Hong Kong as the model of free trade.²⁷

II. BACKGROUND

A. *History of Hong Kong and Its Return to Chinese Sovereignty*

On June 30, 1997, Hong Kong will become a special administrative region (hereinafter SAR) of China.²⁸ By deeming the region a SAR, China and Hong Kong hope to retain

21. See discussion *infra* part II.B.

22. See discussion *infra* part II.C.

23. See discussion *infra* part II.D.

24. See discussion *infra* part II.E.

25. See discussion *infra* part IV.

26. See discussion *infra* part V.

27. Note that the ensuing discussion is not limited to the possible conflicts which may occur in 1997. Rather, this is merely the beginning point for the discussion. This comment examines the implications that may exist on American businesses in light of the potential 1997 conflicts and how these conflicts may be resolved. In addition, politics surrounding China's nonmembership status in GATT is a crucial issue that influences the trade relationship. See discussion *infra* part IV.D.2.

28. Joint Declaration, *supra* note 4, art. I.

Hong Kong's free market economy and independent system of justice under China's sovereignty.²⁹

Great Britain's occupation of present-day Hong Kong involves three separate geographical areas.³⁰ Hong Kong Island ceded to the British in 1842, the Kowloon Peninsula to the British in 1860, and the New Territories were leased to Great Britain by China for ninety-nine years in 1898.³¹ Thus, the New Territories were essentially the subject of controversy between the two countries.³²

Great Britain did not broach the subject of the 1997 "deadline" until 1982, when it became apparent that Britain faced fifteen year land lease renewals on Hong Kong property.³³ This mortgage period indicated that Britain would have to begin thinking about negotiating with China regarding Hong Kong's future.³⁴

Britain originally approached negotiations with China from the position that, because Great Britain had occupied the territory for such a significant period of time, the New Territories, in effect, had implicitly ceded to Great Britain along with Hong Kong Island and the Kowloon Peninsula.³⁵ China did not agree with this view.³⁶ It claimed that the "British had no basis for its claims" because the New Territories were only leased to Great Britain.³⁷ The lease itself best demonstrates the reality of China's assertion.³⁸ Great Britain effectively had no choice in the decision because the rest of Hong Kong could not survive without it.³⁹ Thus, negotiations regarding the method of Hong Kong's return to Chinese sovereignty commenced between Great Britain and China in 1982.⁴⁰

29. *Id.* pmbl.

30. KELLY, *supra* note 5, at 37.

31. *Id.*

32. *Id.*

33. A Draft Agreement Between the People's Republic of China-United Kingdom: Agreement on the Future of Hong Kong, Sept. 26, 1984, 23 I.L.M. 1366, 1367 (1984).

34. *Id.*

35. KELLY, *supra* note 5, at 97.

36. *Id.* at 98.

37. *Id.*

38. *Id.*

39. *Id.* at 97. The New Territories is home to 92% of the population, so losing this territory would effectively destroy Hong Kong. *Id.*

40. *Id.*

The result of over two years of negotiations was the Joint Declaration.⁴¹

B. *The 1984 Joint Declaration*

The Joint Declaration was signed in September 1984⁴² and ratified in 1985.⁴³ The document itself provides no source of law.⁴⁴ Rather, it serves as the framework for policies within which China and Hong Kong will interact beginning June 30, 1997, and continue to do so for at least fifty years, until 2047.⁴⁵

The Joint Declaration denotes the "one country-two systems" concept upon which China based Basic Law.⁴⁶ "One country-two systems" means that Hong Kong can maintain its capitalist scheme as a separate administrative region, although its sovereign power, China, continues to operate under a socialist system.⁴⁷

Following the ratification of the Joint Declaration, the Basic Law Drafting Committee was established to create the law under which China would allow Hong Kong to function under the principles of the Joint Declaration.⁴⁸ Though both Britain and China have ratified the Joint Declaration, many issues still remain unresolved.⁴⁹

C. *Hong Kong Basic Law*

The Joint Declaration will be implemented by what is called Basic Law.⁵⁰ Basic Law can best be explained as a "mini-constitution defining the respective authorities of the Central Government in Beijing and the Hong Kong SAR gov-

41. *Id.*

42. HUNGDAH CHIU, *THE DRAFT BASIC LAW OF HONG KONG: ANALYSIS AND DOCUMENTS* 1 (1988).

43. *Id.*

44. HONG KONG: A CHINESE AND INTERNATIONAL CONCERN 43 (Jurgen Domes & Yu-Ming Shaw eds., 1988).

45. *Id.* at 43.

46. See discussion *infra* part II.C.

47. HONG KONG: A CHINESE AND INTERNATIONAL CONCERN, *supra* note 44, at 54.

48. *Id.* at 55.

49. See discussion *infra* parts IV.A, IV.B. The Joint Declaration provided for the formation of the Sino-British Joint Liaison Group [hereinafter SJLG] to handle unresolved issues prior to 1997. Joint Declaration, *supra* note 4, annex II. The SJLG has no actual power. Rather, it functions as a liaison between the two governments. *Id.*

50. BASIC LAW, *supra* note 14, pmb1.

ernment, the political system of the Hong Kong SAR and the rights and obligations of Chinese citizens in the Hong Kong SAR.⁵¹ A discussion of the relevant portions follows.

Basic Law essentially allows Hong Kong to continue to operate with a "high degree of autonomy,"⁵² except in the areas of foreign affairs⁵³ and defense.⁵⁴ The provision with which this comment is most concerned is article 5, which states that "[t]he socialist system and policies [of China] shall not be practiced in the Hong Kong Special Administrative Region, and the previous capitalist system as a way of life shall remain unchanged for 50 years."⁵⁵ Basic Law spells out the framework for how this system will function in the face of China's socialist system.⁵⁶ Basic Law provides for a free trade policy, which encompasses a continuing free movement of goods, intangible assets, and capital,⁵⁷ no restrictions on foreign exchange of currency, including keeping Hong Kong's present currency,⁵⁸ and the sustainment of land rights, such as ownership and extension of leases, past 1997.⁵⁹

Basic Law also contains a blanket provision that the Hong Kong SAR Government "shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial center."⁶⁰ Article 109 is supported by provisions that establish authority for continuing operation of private shipping lines⁶¹ and private aviation services⁶² in order to facilitate the free movement of goods and continue Hong Kong's free port status.⁶³ In addition, key provisions are designed to preserve Hong Kong's autonomy in international trade circles, such as independent membership in GATT,⁶⁴ and the ability to independently negotiate its own trade agreements.⁶⁵

51. CHIU, *supra* note 42, at 8.

52. BASIC LAW, *supra* note 14, art. 2.

53. *Id.* art. 13.

54. *Id.* art. 14.

55. *Id.* art. 5.

56. JUDITH SIHOMBING, ANNUAL SURVEY OF THE LAW 185 (1992).

57. BASIC LAW, *supra* note 14, art. 115.

58. *Id.* art. 112.

59. *Id.* arts. 120-121.

60. *Id.* art. 109.

61. *Id.* art. 127.

62. *Id.* art. 135.

63. *Id.* art. 114.

64. *Id.* art. 116. See discussion *infra* part II.E.

65. BASIC LAW, *supra* note 14, art. 116.

Present Hong Kong law, based on the British common law system, will remain the law of the Hong Kong SAR.⁶⁶ Current sources of law include statutes, common law, Chinese customs, and British legislation.⁶⁷

Notwithstanding the specificity of Basic Law regarding China's desire to keep Hong Kong in its present state, all of the above provisions are subject to article 8, which states that all pre-1997 laws will become the law of Hong Kong SAR unless they "contravene Basic Law."⁶⁸ Thus, all the policies that the Basic Law protects are subject to review in Beijing in the event China decides that a law contravenes the Basic Law.⁶⁹

Basic Law also includes a bill of rights, aimed at protecting rights and freedoms presently enjoyed by the people of Hong Kong.⁷⁰ Thus, in theory, freedom of speech, press, assembly, and other fundamental rights will be preserved.⁷¹

However, Basic Law does alter the structure of the Hong Kong SAR Government with respect to the three bodies of power.

1. *The Executive Branch*

Hong Kong will continue to function as an executive-led system.⁷² A Chief Executive⁷³ will be appointed by the Chinese Central People's Government,⁷⁴ and will be responsible to the Central People's Government of China.⁷⁵ The Chief Executive is responsible for appointing principal officials of

66. *Id.* art. 8. See also *id.* art. 18. The only law that will not extend past 1997 is British legislation promulgated by the British Parliament. SIHOMBING, *supra* note 56, at 185.

67. BASIC LAW, *supra* note 14, art. 8.

68. *Id.*

69. *Id.* art. 18. One example of this veto occurred in August 1995, when a five year agreement between Cathay Pacific Airways and Taiwan Airlines Association was declared invalid as contradicting Basic Law. Daniel Kwan, *Airlines Agreement Not Valid, Says China*, S. CHINA MORNING POST, Aug. 28, 1995, at 1, available in LEXIS, Asiapac Library, Schina File. China said Cathay was not authorized to negotiate the agreement. *Id.*

70. BASIC LAW, *supra* note 14, arts. 24-42.

71. *Id.* art. 27.

72. *Id.* art. 43.

73. The Chief Executive's position is essentially the same as that of the present Governor of Hong Kong. SIHOMBING, *supra* note 56, at 183.

74. BASIC LAW, *supra* note 14, art. 45.

75. *Id.* art. 43.

Hong Kong SAR,⁷⁶ implementing the laws of the SAR,⁷⁷ and deciding government policies.⁷⁸ The Chief Executive also has the broad power of dissolving the Legislative Council if it refuses to pass a budget or another important bill introduced by the government.⁷⁹ An Executive Council will be available to aid the Chief Executive in implementing the laws of Hong Kong SAR.⁸⁰

2. *The Legislative Branch*

Basic Law also provides for the continuation of the present Legislative Council.⁸¹ The Legislative Council enacts, amends, and appeals laws, approves the budget, and debates various policy addresses of the Chief Executive.⁸² The Legislative Council also has the power to impeach the Chief Executive.⁸³

A bill passed by the legislature goes to the Chief Executive for approval.⁸⁴ If the Chief Executive does not approve it, then the bill goes back to the legislature with comments.⁸⁵ If the legislature again passes the bill with the changes, then the Chief Executive must sign it.⁸⁶ All bills signed are subject to review by the Chinese Government.⁸⁷

Policy issued by China in July 1995 indicates that China intends to operate a parallel legislature that will be formed in late 1996.⁸⁸ The complexity of having two legislatures operating at the same time prior to 1997 has been criticized, but China has implied that the formation of such a legislature, while problematic, could not be avoided.⁸⁹

76. *Id.* art. 48.

77. *Id.*

78. *Id.*

79. *Id.* art. 50. This drastic move, however, may only be done once during the Chief Executive's term of office. *Id.*

80. *Id.* art. 54.

81. *Id.* art. 66.

82. *Id.* art. 73.

83. *Id.* art. 73(10).

84. *Id.* arts. 74-75.

85. *Id.* art. 49.

86. *Id.*

87. *Id.* art. 17. See discussion *infra* part IV.A.1.a.

88. Anson Chan Warns on 1997 Confusion, S. CHINA MORNING POST, July 20, 1995, at 4, available in LEXIS, Asiapc Library, Schina File.

89. *Id.*

3. *The Judicial Branch*

Since Hong Kong SAR will continue to operate in a common law system, it will retain the judiciary as it presently functions, with district courts, courts of appeal, and a supreme court.⁹⁰ A major role for the courts in the Hong Kong SAR will be to determine the compatibility of Basic Law with the laws brought before the courts.⁹¹

Making this compatibility determination requires the courts to distinguish between adjudication and interpretation.⁹² Adjudication is "the legal process of resolving a dispute."⁹³ Interpretation is the "art or process of discovering and ascertaining the meaning of a statute . . ."⁹⁴ The power of final adjudication lies in the judiciary,⁹⁵ while the final right of interpretation rests in China's legislative branch.⁹⁶

Basic Law establishes that the power of final adjudication will be held by a Court of Final Appeal, which will be established prior to 1997.⁹⁷ Its creation will be monitored by the Sino-British Joint Liaison Group [hereinafter SJLG].⁹⁸ There has been intense conflict regarding formation of the Court of Final Appeal.⁹⁹ This conflict has recently been resolved in part.¹⁰⁰ The court will begin to operate on July 1, 1997.¹⁰¹ This date has been criticized because it had previously been agreed that the legislature would be operational before 1997, so that it could gain experience under British rule.¹⁰² Three of the four permanent Hong Kong judges sit-

90. BASIC LAW, *supra* note 14, art. 81.

91. SIHOMBING, *supra* note 56, at 190.

92. *Id.*

93. BLACK'S LAW DICTIONARY 42 (6th ed. 1990).

94. *Id.* at 817.

95. BASIC LAW, *supra* note 14, art. 82.

96. *Id.* art. 158. See also discussion *infra* part II.D.2.

97. BASIC LAW, *supra* note 14, art. 82.

98. See *supra* note 47.

99. *A Good Sign for Hong Kong*, INT'L HERALD TRIB., June 13, 1995, available in LEXIS, Asiapac Library, Curnws File. Presently, there is some strife between China and Great Britain regarding formation of the Court of Final Appeal. See discussion *infra* part IV.B.1. China has threatened repeatedly to eliminate this court should Great Britain not follow China's instructions regarding its formation. Danny Gittings, *Hong Kong: Row Over CFA Judges Obscures Original Intent of Court*, S. CHINA MORNING POST, Apr. 2, 1995, available in LEXIS, Asiapac Library, Schina File. See also discussion *infra* part IV.B.1.

100. Gittings, *supra* note 99.

101. *Judging the Judges*, S. CHINA MORNING POST, Aug. 23, 1995, at 19, available in LEXIS, Asiapac Library, Schina File.

102. *Id.*

ting on the Court of Final Appeal can be of any nationality, one may be from an outside common law jurisdiction, and the chief justice must be a Hong Kong Chinese.¹⁰³

D. *Chinese Law*

Chinese law is based on a disciplinary system.¹⁰⁴ Disputes are explicated on a case-by-case basis.¹⁰⁵ The process emphasizes the maintenance of an existing hierarchy, the authority of superior figures, and group cohesion.¹⁰⁶ There is a strong concern for order, so enforcement generally pivots on a system of duties without rights.¹⁰⁷

In the past, China has relied primarily on a strong centralized government, but recently it has become apparent that such central authority is no longer as powerful as it once was.¹⁰⁸ Gradually, local governments have enjoyed more autonomy over their own affairs as China has realized it could not tightly control all regions.¹⁰⁹ This decentralization process has been enormously successful for China's growth, but in fact, socialist theory still pervades even these regions.¹¹⁰

1. *Basic Premises of Socialist Law*

Socialist law differs from civil and common law systems because it states an ideology as the framework for perpetuat-

103. Barry Wigham, *No Legal Vacuum in Hong Kong*, WASH. POST, Aug. 14, 1995, at A16.

104. THOMAS B. STEPHENS, *ORDER AND DISCIPLINE IN CHINA* 5 (1992).

105. *Id.*

106. *Id.*

107. *Id.* This comment will not examine the role human rights plays in the arena of trade agreements between China and other countries, although sanctions for violations of human rights have been used in the past. To add some dimension to the discussion, however, it is worth mentioning that "China remains a country in which [a person] has very few rights that can be asserted against the state and its officials. Civil rights and human rights remain alien concepts with very little meaning, which the state addresses only under pressure from meddling foreigners." W.F. JENNER, *THE TYRANNY OF HISTORY: THE ROOTS OF CHINA'S CRISIS* 147 (1992).

108. Yasheng Huang, *Why China Will Not Collapse*, FOREIGN POL'Y, Summer 1995, at 54.

109. *Id.*

110. Caspar W. Weinberger, *Market-Oriented Socialism Versus the Free Market*, FORBES, Oct. 25, 1993, at 35. Ironically, China's growth is "driven by nonstate industries, yet state-owned enterprises" still comprise the lion's share of industrial output. *Id.* It is these differences that cause concern, since China does not seem to observe or understand these statistics. *Id.*

ing goals of the society.¹¹¹ In this framework, the needs of the individual are subordinated to a singular purpose or goal.¹¹² Thus, socialist economies often create a dual system of laws: one that applies to domestic businesses, and another to foreign businesses or joint ventures between domestic and foreign businessmen.¹¹³ This dual legal system is designed to preserve the goals of the socialist regime and, at the same time, foster foreign investment to allow the country to emerge economically on the world front.¹¹⁴ This is the struggle that China is currently engaged in. Its constitution provides that the individual economy seeks to "complement [the] socialist economy . . . [and] permits [a] private economy to exist" according to the limits prescribed by the administrative bodies of the Chinese Government.¹¹⁵

2. *The Executive Branch*

China's administrative system consists of "one-party rule with centralized decision-making."¹¹⁶ Thus, the Communist Party is China's executive body, and also its central political body.¹¹⁷

The State Council is the highest executive body in China.¹¹⁸ The Premier of the State Council is the leader of the State Council.¹¹⁹ The State Council functions to direct and administer almost every aspect of life in China.¹²⁰

The State Council issues decisions and orders¹²¹ and may adopt administrative regulations, rules, and measures.¹²² It regularly plays an important role in economic reform.¹²³ Ad-

111. Anne Carver, *Inventing a Legal Tradition*, in *ADVANCES IN CHINESE INDUSTRIAL STUDIES* 31 (Sally Stewart ed., 1995).

112. *Id.*

113. *Id.* at 45.

114. *Id.* at 40. It has been argued that socialism "deprives [China] of the very knowledge that its [economic advancement] require[s]." *Id.* at 57.

115. P.R.C. CONST. ch. I, art. 11.

116. Nicholas D. Kristof, *China Sees 'Market-Leninism' as Way to Future*, N.Y. TIMES, Sept. 6, 1993, at A1.

117. *Id.* at A4.

118. P.R.C. CONST. ch. III, art. 85.

119. *Id.* art. 86. The current Premier is Li Peng. Matt Moffett, *China's Communist Party Chief Jiang Bolsters Status as Deng's Heir Apparent*, WALL ST. J., Dec. 2, 1994, at A6.

120. P.R.C. CONST. ch. III, art. 89.

121. *Id.* art. 89(1).

122. *Id.*

123. *Id.* art. 89(5).

ditionally, the State Council conducts foreign affairs and negotiates foreign treaties and agreements.¹²⁴

3. *The Legislative Branch*

The 1982 Constitution established a five-tier system to adopt legislation.¹²⁵ These five tiers are the National People's Congress [hereinafter NPC], the Standing Committee of the National People's Congress (hereinafter SCNPC), the State Council, local governments, and the Local People's Congresses.¹²⁶ Together, the NPC and the SCNPC embody the legislative power of China.¹²⁷

The NPC is the highest lawmaking body, both in theory and in practice.¹²⁸ The NPC possesses the power to amend the Constitution,¹²⁹ and it can amend and enact all basic laws.¹³⁰ Another key function of the NPC is to elect the President of the Supreme People's Court, and the President and Vice President of China.¹³¹

The SCNPC's chief function is to interpret the Constitution and supervise its enforcement,¹³² except for those laws which are exclusively within the power of the NPC.¹³³ The Constitution specifically grants the SCNPC power to decide on international treaties and "important [international] agreements."¹³⁴ Further, the SCNPC is the supervisory body

124. *Id.* art. 89(9).

125. P.R.C. CONST. ch. III, art. 57, 85, 95.

126. *Id.* Local governments will not be discussed here, as they deal primarily with administration regulation and are not relevant to the discussion at hand. JENNER, *supra* note 107, at 86. They play an important role in the legal system, since most laws are so broadly drafted that they offer little explanation regarding implementation. *Id.*

Local People's Congresses have the power to adopt local legislation. P.R.C. CONST. ch. III, art. 99. These local laws apply only to the geographic area in which they sit. JENNER, *supra* note 107, at 87. Local People's Congresses may only adopt laws where the Central Government has not yet done so, and the laws cannot conflict with any law promulgated by the Central Government. *Id.*

127. P.R.C. CONST. ch. III, art. 58.

128. ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 79 (1992).

129. P.R.C. CONST. ch. III, art. 62(1).

130. *Id.* art. 62(3).

131. *Id.* art. 62(4). In addition, the NPC holds the power to recall the President and the President of the Supreme Court. *Id.* art. 63.

132. *Id.* art. 67(1).

133. *Id.* art. 67(2).

134. *Id.* art. 67(14).

governing the State Council and the Supreme People's Court.¹³⁵

4. *The Judicial Branch*

There are four levels of organization in China's judicial branch:¹³⁶ the Supreme People's Court,¹³⁷ the High People's Court,¹³⁸ the Intermediate People's Courts,¹³⁹ and the Basic Level People's Courts.¹⁴⁰ All courts hold general jurisdiction, but most have divisions within them.¹⁴¹ All four courts are organized in the same way. They each have a President, a Vice President, a Chief Judge, Associate Chief Judges, and Adjudicators.¹⁴² Judges are appointed by members of the NPC who hold equivalent positions,¹⁴³ and they serve limited terms.¹⁴⁴

There are many problems with China's court system. First, there is a problem regarding judicial competence.¹⁴⁵ Modern legal training was virtually nonexistent until after the beginning of the new economic system.¹⁴⁶ From approximately the mid-1950's to the late 1970's, no legal training whatsoever took place.¹⁴⁷ Consequently, many currently serving judges do not possess any formal legal training on which to base their decisions.¹⁴⁸

Another problem is that there is no formal precedential value to judicial decisions, primarily because decisions are unpublished.¹⁴⁹ The result is a less formal system.¹⁵⁰ In

135. *Id.* art. 67(6).

136. CHEN, *supra* note 128, at 107.

137. *Id.* at 108.

138. *Id.* at 107. These consist of approximately 31 autonomous regions and provinces. *Id.*

139. *Id.* There are approximately 376 intermediate courts. *Id.*

140. *Id.* There are approximately 3000 basic level courts. *Id.*

141. *Id.* at 108. These divisions are criminal, civil, economic, and administrative. *Id.*

142. *Id.*

143. *Id.* at 109. As an example, the President would be considered approximately the same level as a member of the NPC, and the Vice President would be approximately the same level as a member of the SCNPC.

144. *Id.*

145. *Id.* at 110.

146. *See id.*

147. *Id.*

148. *Id.* at 109. As of 1991, approximately 40-50% of judges lacked any kind of legal training. *Id.* Indeed, many judges are ex-army, or former public or security officials. *Id.*

149. *Id.* at 114.

China, a judge actually plays a more important role than a judge operating under a common law system of adjudication, because he is asked to serve as a trier of fact as well as law.¹⁵¹

Moreover, corruption continues to be a significant problem.¹⁵² Corruption can present serious problems in countries where politics heavily influence legislative and judicial decisions.¹⁵³ Problems with corruption may cause problems with judicial independence.

Enforcement of decisions is another difficulty.¹⁵⁴ Because there is no precedential value to the courts' decisions, the courts lack importance as an institution. This view of the judicial system has the effect of reducing the creation of enforcement mechanisms which are clearly the cornerstone of a just judicial system.¹⁵⁵ Lastly, problems of interpretation infest the judicial system, because the power of final interpretation lies in the legislature, not the judiciary.¹⁵⁶

E. *The General Agreement on Trade and Tariffs (GATT)*

1. *What is GATT?*

The General Agreement of Trade and Tariffs¹⁵⁷ was formed by twenty-three countries in 1947.¹⁵⁸ The original underlying principles of GATT consisted of destroying trade barriers, establishing a trade regime, and developing an institution that could expedite these principles and ideals.¹⁵⁹ Key GATT policies involve open markets and nondiscrimination between GATT members.¹⁶⁰

150. *Id.* at 112.

151. *Id.*

152. S.Y. Yue & C.K. Lau, *Challenge for Professions*, S. CHINA MORNING POST, Nov. 5, 1994, at 15, available in LEXIS, Asiapc Library, Schina File.

153. *Id.* Corruption appears to be worsening, and reports assert that "a few years ago the problem was petty bribery of a few dollars; now [it numbers in the] millions or billions." Kristof, *supra* note 116, at A5.

154. JENNER, *supra* note 107, at 146. Enforcement is not a problem in the criminal courts, and these judgments are enforced absolutely. *Id.* at 146-47.

155. *Id.*

156. P.R.C. CONST. ch. III, art. 67(6).

157. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT 1947].

158. ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 50 (1990).

159. PAUL B. STEPHAN III ET AL., *INTERNATIONAL BUSINESS AND ECONOMICS* 58 (1993).

160. General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter GATT 1994], pmbl.

Over the years, the original GATT terms have been repeatedly negotiated and subjected to numerous multilateral trade negotiations.¹⁶¹ The evolution of GATT has created a number of other provisions which were necessary to function in an increasingly global economic trade system.¹⁶²

One of GATT's key provisions, which has undergone a number of changes since 1947, is its dispute resolution system.¹⁶³ A primary problem with GATT is that its dispute settlement system contains no legal power and no real enforcement mechanism.¹⁶⁴ Also, current enforcement mechanisms, in particular trade sanctions, are in fact somewhat inconsistent with GATT principles of free trade.¹⁶⁵

The United States Congress recently ratified GATT 1994, which will replace the previous GATT negotiation.¹⁶⁶ GATT 1994 creates the WTO, which will resolve world trade disputes.¹⁶⁷ The WTO creates a permanent seven-member panel to adjudicate disputes.¹⁶⁸ From these seven members, three will be chosen to adjudicate an individual dispute.¹⁶⁹ If a challenge succeeds, then the panel will attempt to reach a solution to which both countries must adhere.¹⁷⁰ Since ultimately each party must agree to this decision, disputing parties are, in effect, "judges of their own cause."¹⁷¹

161. STEPHAN ET AL., *supra* note 159, at 59.

162. *Id.* at 58.

163. *Id.* at 59.

164. ERNST-ULRICH PETERSMANN & MEINHARD HILF, *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 346 (1991).

165. *Id.* at 557. This fact is particularly true with respect to anti-dumping provisions which allow countervailing duties to be imposed upon noncomplying countries that refuse to adhere to rulings of the GATT dispute resolution panel. GATT 1994, *supra* note 160, art. VI. See also General Agreement on Tariffs and Trade, Sept. 26, 1984 [hereinafter GATT 1984], art. VI.

166. Stewart M. Powell, *Senate Unites to Pass GATT*, S.F. EXAMINER, Dec. 2, 1994, at A1. As of August 31, 1994, Hong Kong was one of 118 countries that had signed GATT 1994. *Report on General Agreement on Tariffs and Trade*, 33 I.L.M. 1125, 1127 (1994). However, China is not a member. See discussion *infra* part II.E.3.

167. Harvey Berkman, *As GATT Gains, Will States Wane?*, NAT'L L. J., Nov. 14, 1994, at 20.

168. *Id.*

169. GATT 1994, *supra* note 160, annex 2, art. 3.

170. *Id.*

171. MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 393 (1995).

Member countries must accept the findings of the panel.¹⁷² This obligation is grounded in the idea that member nations will treat GATT authority as bearing the same strength as their own domestic law adjudication.¹⁷³ If member nations do not treat GATT authority as having the same strength, this would effectively weaken the position of GATT and signal a "legal failure."¹⁷⁴

If a solution cannot be reached, or a situation rectified, the offended country may retaliate with tariff or trade barriers, without fear of backlash.¹⁷⁵ Generally, commentators view GATT 1994 and the birth of the WTO in the following manner:

GATT [was] no more than a contract. It [was] not an international [organization] and lack[ed] a solid legal foundation. The [new GATT] agreement will bring about a most important change. It will create a multilateral World Trade Organization with the same status as, for example, the World Bank and International Monetary Fund.¹⁷⁶

The WTO was designed to "[provide] security and predictability to the multilateral trading system."¹⁷⁷ GATT 1994 specifies that the WTO "shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments The agreements and associated legal instruments . . . [bind] all Members."¹⁷⁸ Again, the strength of this assertion bears directly upon member nations' acceptance of WTO as a binding legal instrument.¹⁷⁹

172. HUDEC, *supra* note 158, at 364.

173. *After Free Trade Euphoria, Now Comes the Hard Part*, Daily Report for Executives, Jan. 20, 1995, available in LEXIS, Legnew Library, Curnws File.

174. *Id.*

175. GATT 1994, *supra* note 160, annex 2, art. 3. Such retaliation has generally had little effect in actually ending trade disputes, and is almost inconsequential when levied by smaller countries on larger, more powerful economies. TREBILCOCK & HOWSE, *supra* note 171, at 396.

176. *China in GATT Could Put US [sic] in a Fix*, S. CHINA MORNING POST, Mar. 11, 1994, available in LEXIS, Asiapc Library, Schina File.

177. Agreement Embodying the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1266 [hereinafter WTO Charter], art. II.

178. *Id.*

179. See *supra* notes 160-62 and accompanying text.

2. *Hong Kong's Membership*

Hong Kong has been a member of GATT since 1986.¹⁸⁰ The Joint Declaration provides for Hong Kong's continued separate membership.¹⁸¹ Basic Law also specifically provides for Hong Kong's separate membership in GATT.¹⁸² GATT itself also provides for membership of certain territories which have full autonomy in conducting commercial relations, such as Hong Kong.¹⁸³

3. *China's Application for Membership*

a. *History*

China is currently not a member of GATT.¹⁸⁴ It was a founding member of GATT in 1947.¹⁸⁵ However, in 1949, it withdrew from the organization following the assumption of Communist leadership.¹⁸⁶ In 1986, it became clear to China that it needed GATT,¹⁸⁷ so it subsequently filed an official membership application¹⁸⁸ and began to make significant strides in implementing various economic programs designed to assist its re-entry.¹⁸⁹

The United States chairs China's admission committee.¹⁹⁰ The primary concern with China's membership is its trade law and policies.¹⁹¹ The United States is concerned about China's commitment to a free market.¹⁹²

The United States views GATT membership as having certain benefits and responsibilities, and China has problems

180. HONG KONG: A CHINESE AND INTERNATIONAL CONCERN, *supra* note 44, at 139.

181. Joint Declaration, *supra* note 4, art. VI.

182. BASIC LAW, *supra* note 14, art. 116.

183. GATT 1984, *supra* note 165, art. XXVI, § 5(c).

184. GATT 1994, *supra* note 160, pmbl.

185. GATT 1947, *supra* note 157, art. XXVI.

186. *Trade Officials Doubt China Will Be in GATT Before '95*, Japan Economic Newswire, May 25, 1994, available in LEXIS, Asiapc Library, Allasi File.

187. *Chinese Vice Premier Prods U.S. on China's Accession to GATT*, Daily Report for Executives, Nov. 7, 1994, available in LEXIS, Legnew Library, Curnws File.

188. HONG KONG: A CHINESE AND INTERNATIONAL CONCERN, *supra* note 44, at 139.

189. Former United States Trade Representative Ambassador Clayton Yeutter, Address at the American Chamber of Commerce, Hong Kong (Feb. 5, 1988).

190. *Trade Officials Doubt China Will Be in GATT Before '95*, *supra* note 186.

191. *Id.*

192. *Id.*

realizing that it has not yet met the minimum standards.¹⁹³ This delay has no immediate impact on the United States' trade with China, however, because China was granted conditional renewal of its Most Favored Nation¹⁹⁴ status for the current year,¹⁹⁵ and has also recently been granted observer status.¹⁹⁶

b. *Why China's Application Has Not Been Accepted by GATT*

Four main issues must be resolved before China's application can be accepted: transparency of trade laws, separate domestic and foreign trade laws, convertibility of China's currency, and protection of intellectual property rights.¹⁹⁷

(1) The Transparency Requirement

One of the main problems with China's application is its lack of a consistent, written set of laws.¹⁹⁸ The necessity of this is based on the premise that a successful market "must be controlled through known and impersonal rules that can be enforced."¹⁹⁹ Without set rules, foreign businesses and individual investors will not have the confidence to invest, short- or long-term, in China.²⁰⁰

Article 10 of GATT 1984 requires that a country's trade rules be published.²⁰¹ In 1994, China published its trade law

193. Victor Ego Ducrot, *China: World's Third Largest Economy Excluded from GATT*, Inter-Press Service, May 27, 1993, available in LEXIS, Asiapc Library, Allasi File.

194. Most Favored Nation [hereinafter MFN] status allows China to trade with the United States based on the nondiscrimination principle of GATT although China is not a member of GATT. STEPHAN ET AL., *supra* note 159, at 668. This principle states that the United States will engage in trade policies whereby it treats China no worse than any other country. *Id.*

195. *Time to Take a New Path*, S. CHINA MORNING POST, May 28, 1994, available in LEXIS, Asiapc Library, Schina File.

196. Dede Nickerson, *Officials Warn on Fast Entry to WTO*, S. CHINA MORNING POST, July 15, 1995, available in LEXIS, Asiapc Library, Schina File.

197. *China to Shun World Unless U.S. Backs Down, China Gives Ultimatum on GATT*, S. CHINA MORNING POST, Nov. 24, 1994, available in LEXIS, Asiapc Library, Schina File.

198. Carver, *supra* note 111, at 11.

199. JENNER, *supra* note 107, at 148.

200. *Id.* at 148-49.

201. GATT 1984, *supra* note 165, art. X. GATT/WTO does not seek to make world trade fair. Rather, it seeks to establish rules by which all member nations can participate in free trade. STEPHEN ET AL., *supra* note 159, at 672.

in order to meet the transparency requirement.²⁰² At the present time, China's securities, banking, company, and labor laws are awaiting approval.²⁰³ Notwithstanding these efforts, the transparency requirement has not been fulfilled because, like much of China's other recently published legislation, it is very ambiguous. In fact, numerous legal scholars have asserted that although trade laws continue to be published, the ambiguity of such laws creates a legal ground that is "more rather than less opaque."²⁰⁴

For instance, the general commercial code is less specific than most industrialized nations are used to, and willing to, deal with.²⁰⁵ In fact, until the 1980's there was no written commercial code at all.²⁰⁶ In the scurry to attract investors into China, codes were hastily written.²⁰⁷ Ambiguous laws, coupled with an extreme shortage of lawyers²⁰⁸ and a stubborn adherence to party policy,²⁰⁹ have created an uncertain ground upon which to build trade and investment agreements for American businesses.²¹⁰ The existing codes are mainly administrative, and they rely heavily on mediation.²¹¹ Furthermore, they require constant reinterpretation, since the judiciary's decisions lack precedential value.²¹² Not only is it necessary for China to publish its commercial and property law, but China must *create* it.²¹³

One necessary related aspect of the difficulty of attaining total transparency is the existence of an internal "neibu" statement.²¹⁴ Neibu statements are internal statements that seek to advance the political goals of China's socialist society.²¹⁵ In effect, these statements have greater strength

202. STEPHEN ET AL., *supra* note 159, at 672.

203. Carver, *supra* note 111, at 22.

204. *Id.* at 28.

205. JENNER, *supra* note 107, at 150.

206. *Id.*

207. *Id.*

208. *Id.* at 142.

209. *Id.* at 150.

210. *Id.* at 151.

211. *Id.*

212. *See supra* text accompanying note 146.

213. JENNER, *supra* note 107, at 151.

214. Anne Carver, *Priests and Worshippers: International Business in China*, in CHINESE MANAGEMENT ISSUES FOR THE 1990's (John Child ed., forthcoming 1996).

215. *Id.*

within the political and legal structure of China than any promulgated law.²¹⁶

(2) Domestic and Foreign Investment Laws

One key problem that precludes China's entrance into GATT is that its dual legal system creates problems for foreign investors.²¹⁷ This dual system exists because the Chinese Constitution mandates the implementation of foreign investment as part of its planned socialist economy.²¹⁸ In essence, China has created a system whereby domestic and foreign economic policy are run under a socialist theory, even though the only foreign economic policy that can allow China to grow must exist under a capitalist scheme. The dual system interferes with such growth, and yet China continues to be extremely stubborn about preserving the socialist system in the face of market expansion.²¹⁹

The dual legal system reflects China's desire to continue to tightly control its market and those who deal within that market, a goal that directly interferes with GATT's central purpose of liberalizing the market.²²⁰ China views foreign investment as essential, but under the guise of national sovereignty, it still maintains its right to control capital movement, property rights, and "conditions under which national or legal persons can exercise economic activity."²²¹ Such laws make it more difficult for foreigners to invest in China because presently the dual system creates an atmosphere in which China "[seeks] to build up domestic industries . . . at the expense of international competition."²²² This directly contradicts GATT principles.

Another issue related to this system involves the problem of land ownership. In China, foreigners cannot own land.²²³ Instead, they can only lease it.²²⁴ This problem is particularly acute with respect to property rights, since prop-

216. *Id.*

217. MICHAEL J. MOSER, FOREIGN TRADE, INVESTMENT, AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 90 (1987).

218. P.R.C. CONST. ch. III, arts. 15, 89.

219. MOSER, *supra* note 217, at 92.

220. STEPHEN ET AL., *supra* note 159, at 672.

221. Carver, *supra* note 111, at 35.

222. *After Free Trade Euphoria, Now Comes the Hard Part*, *supra* note 173, at 48.

223. P.R.C. CONST. ch. III, art. 10.

224. *Id.*

erty in China is still owned by the state.²²⁵ Overseas investors are similarly precluded from owning property.²²⁶ In order to invest in property or use land for the purpose of promoting foreign business, the foreign investor must form a joint venture with a Chinese entity.²²⁷ Uneven treatment of the foreign investor makes investment a precarious venture.²²⁸

(3) Inconvertible Currency

China's currency, the renminbi, is inconvertible currency.²²⁹ In other words, any renminbi earned on domestic sales is not readily convertible into foreign exchange.²³⁰ The original principle behind Chinese foreign currency limitations is that the government "views foreign currency owned by trading companies and enterprises as ultimately belonging to the State."²³¹ Therefore, China does not want currency taken out of the country, and it must be exchanged in China.²³² The only way to exchange foreign currency is through mainland swap centers.²³³

China's investment regulations require that there be a foreign exchange balance, which means that revenues must cover expenditures before money can be exchanged for foreign currency.²³⁴ In addition, market forces usually make it difficult to swap all money directly earned on domestic sales, resulting in slow extraction of profits from China for foreign investors.²³⁵

225. LAND ADMINISTRATION LAW OF THE PRC, art. 6 (on file with author).

226. PROVISIONAL ADMINISTRATIVE MEASURES GOVERNING COMMERCIAL LAND DEVELOPMENT AND MANAGEMENT BY FOREIGN INVESTORS, art. 2 (P.R.C.) (on file with author).

227. *Id.* art. 4.

228. *Id.*

229. John Frisbie & Richard Brecher, *A Tough Balancing Act*, CHINA BUS. REV., Nov.-Dec. 1993, at 9.

230. *Id.*

231. Virginia Davis & Carlos Yi, *Balancing Foreign Exchange*, CHINA BUS. REV., Mar.-Apr. 1992, at 15.

232. *Id.*

233. Frisbie & Brecher, *supra* note 229, at 9. China eliminated swap centers as the sole exchange centers in 1994, but the problem of foreign exchange still exists because it is still extremely difficult to exchange money in the short run. Lucille A. Barale & Thomas E. Jones, *Getting Strict with Foreign Exchange*, CHINA BUS. REV., Sept.-Oct. 1994, at 52.

234. Frisbie & Brecher, *supra* note 229, at 9. This balance requirement effectively prevents the convertibility of renminbi into other foreign currency. *Id.*

235. *Id.*

China's inconvertible currency problem makes foreign investors nervous about investing in Hong Kong.²³⁶ Therefore, in June 1991, the SJLG reached an "investment protection agreement," which sought to make foreign investors feel secure about their investments in Hong Kong.²³⁷ One provision allowed Hong Kong investors to remove their investments without restrictions on conversion into foreign currency.²³⁸

(4) Inadequate Intellectual Property Protection

Intellectual property continues to be a source of great tension with respect to China's membership application, since in the past China has failed to provide adequate protection for copyrights, patents, trademarks, and trade secrets.²³⁹ In addition to GATT requirements regarding intellectual property, China is also being pressured by the World Intellectual Property Association to conform to world standards of protection.²⁴⁰ China has made a strong effort in this area by issuing updated regulations nearly every year in order to meet the standards imposed, but still has been unable to meet the expectations of the GATT admissions committee.²⁴¹

One primary difficulty has been China's failure to enforce the laws it writes, as exemplified by continuing United States-China trade problems.²⁴² China's struggle with negotiations over protection of intellectual property rights precludes it from joining GATT, because it is "openly breaking" the rules of GATT 1994.²⁴³ For instance, the United States has insisted that China close twenty-nine factories in South-

236. Kent Chen, *Protection for Overseas Investors*, S. CHINA MORNING POST, June 6, 1991, available in LEXIS, Asiapc Library, Schina File.

237. *Id.*

238. *Id.*

239. Joseph T. Simone, Jr., *Improving Protection of Intellectual Property*, CHINA BUS. REV., Mar.-Apr. 1992, at 9.

240. *Id.*

241. *Id.* at 11.

242. Allison Smith, *China Piracy Hits U.S. Firms Hard*, S.F. EXAMINER, Feb. 13, 1995, at D1. Current figures estimate that the United States loses close to \$900 million due to piracy of movies, music, computers, and books because of China's inadequate enforcement of intellectual property protection legislation. *Id.* Complaints filed with the International Intellectual Property Association place the total loss for 42 complaining companies at approximately \$8.6 billion per year. *China, Turkey, India, Brazil Faulted for Inaction of Intellectual Property*, Daily Report for Executives, Feb. 14, 1995, available in LEXIS, Legnew Library, Curnws File.

243. *China Piracy Hits U.S. Firms Hard*, *supra* note 242, at D4.

ern China that churn out pirated goods.²⁴⁴ The United States and other countries concerned with China's inability to address such a request view the problem as directly connected to the fact that "reported involvement of the army and some government officials in pirating operations has also stymied crackdown efforts."²⁴⁵

Despite the fact that in February, 1995, China and the United States signed a new intellectual property rights agreement aimed at ending the trade war, much concern still exists regarding China's intent to enforce the provisions under the agreement.²⁴⁶ All of these difficulties invariably contribute to the United States' concern about Hong Kong's transition in 1997.

(5) Dispute Resolution Mechanisms

Lastly, China does not want to subject its disputes to the settlement mechanisms that bind current WTO members.²⁴⁷

F. *Current United States Policy Toward Hong Kong in Preparation for 1997*

On October 5, 1992, President George Bush signed the United States-Hong Kong Policy Act into law.²⁴⁸ The Act gives the United States the authority to treat Hong Kong as a nonsovereign entity distinct from China.²⁴⁹ The Act identifies the United States' stance on negotiation and enforcement of bilateral and multilateral trade agreements involving the United States and Hong Kong.²⁵⁰ The United States will continue to trade and negotiate agreements post-1997 in the same manner that it did prior to that date.²⁵¹ Economic agreements will continue to be negotiated directly with Hong Kong.²⁵² Addressing China's sovereign power over Hong Kong post-1997, the United States stated its intention to deal

244. Jim Abrahms, *U.S., China Leave Room to Resolve Trade War*, S.F. EXAMINER, Feb. 6, 1995, at B2.

245. *Id.*

246. Nickerson, *supra* note 196, at 1.

247. Gerald Segal, *We Can Shape China as a Congenial Superpower*, L.A. TIMES, Aug. 7, 1995.

248. Hong Kong-United States Policy Act of 1992, Pub. L. No. 102-383, 106 Stat. 1448 (codified at 22 U.S.C. §§ 5701-5732 (1992)).

249. 22 U.S.C. § 5711 (Supp. IV 1992).

250. *Id.* § 5712.

251. *Id.* § 5713(10).

252. *Id.* § 5713(2).

with Hong Kong as a "fully autonomous" region from China "with respect to economic and trade matters."²⁵³

The United States also acknowledges China's part in economic agreements with respect to bilateral investment treaties,²⁵⁴ stating that these agreements will be made "in consultation with the People's Republic of China."²⁵⁵

The Act preserves the rights and obligations of the United States regarding international contracts and agreements the United States and Hong Kong have entered prior to 1997.²⁵⁶ In addition, the Act mandates the application of United States law for adjudication of disputes in the same manner as currently exists.²⁵⁷ The United States acknowledges its strong interest in the "continued vitality, prosperity, and stability of Hong Kong."²⁵⁸

Indeed, Hong Kong is the thirteenth largest market for American exports.²⁵⁹ The United States currently has approximately \$6 billion invested in Hong Kong.²⁶⁰ Hong Kong's location plays an integral role in American trade with China and Southeast Asia, both burgeoning world markets.²⁶¹ It has been argued that Hong Kong needs the United States in order to ensure the continuation of its capitalist free market.²⁶²

The United States has also issued a number of United States-Hong Kong Policy Reports. The most recent report, issued April 1, 1995, stated that the United State has become "increasingly concerned by China's slowness to reach important agreements regarding Hong Kong's transition through 1997 — particularly those which affect U.S. interests."²⁶³ In

253. *Id.* § 5713(3).

254. *Id.* § 5713(10).

255. *Id.*

256. *Id.* § 5721(b).

257. *Id.* § 5721(a).

258. *Id.* § 5701(4).

259. HONG KONG: A CHINESE AND INTERNATIONAL CONCERN, *supra* note 44, at 173.

260. American Consulate General, Remarks on U.S. Direct Investment in Hong Kong Global and Regional Context, Hong Kong (Dec. 2, 1992) (on file with author).

261. See William McGurn, *Hong Kong Needs U.S. Voice*, FAR E. ECON. REV., June 21, 1990, at 34.

262. *Id.* The United States is also valuable to Hong Kong. Approximately 40% of all Hong Kong's exports go to the United States. *Id.*

263. Simon Beck, *USA: China 'Slow to Act' on Transition*, S. CHINA MORNING POST, Apr. 1, 1995, available in LEXIS, Asiapc Library, Schina File.

this report, the United States urged the SJLG to reach an agreement on several key issues which China refuses at present to discuss.²⁶⁴ One of those issues is the continuance of the Legislative Council as it currently operates and the establishment of the Court of Final Appeal, both provided for in the Joint Declaration and Basic Law.²⁶⁵ The United States asserted in this report that it would view China's resolution of these issues as a strong indication that China wishes to comply with the provisions of the Joint Declaration.²⁶⁶

III. IDENTIFICATION OF THE PROBLEM

Having created a framework within which to discuss the problems of post-1997 trade negotiations with China and Hong Kong, this comment presents an analysis of what could happen post-1997, and the impact all of these changes can have on American businesses investing in Hong Kong SAR.²⁶⁷ Sorting out the potential for difficulties here is multifaceted.

Domestic governments play an important role in international trade and investment, because adherence is only as good as the laws which govern it. Therefore, identifying potential problems in China and Hong Kong's future becomes imperative to determining what the United States can do to protect its own interests.²⁶⁸ Examining the likelihood of China's adherence to the Joint Declaration and Basic Law, observing China's own interest in maintaining its economic well-being,²⁶⁹ the impact of China's current political climate²⁷⁰ and GATT membership²⁷¹ will complete the picture of this complex interaction.

Finally, proposals as to how the United States can best mitigate such an uncertain trading future will offer a perspective on the dynamics of trade and investment between

264. *Id.*

265. *Hong Kong: Law — US Fears over Future of Hong Kong Legal System*, Lloyd's List, Apr. 12, 1995, available in LEXIS, Asiapc Library, Curnws File.

266. *Id.*

267. Of course, this argument focuses on a somewhat longer period of time than immediately after 1997.

268. See discussion *infra* part IV.

269. See discussion *infra* part IV.B.2.

270. See discussion *infra* part IV.E.1.

271. See discussion *infra* part IV.D.

Hong Kong and the United States.²⁷² Again, this comment asks the question: what will happen in 1997?

IV. ANALYSIS

A. *Resolving Inconsistencies Between Basic Law and the Chinese Constitution*

1. *Separation of Powers*

One main problem with the interaction between the Hong Kong SAR and China concerns the apparent lack of separation of powers. Arguably, the Constitution of China and Basic Law each set out government structure denoting the executive, judiciary, and legislature as separate branches of government.²⁷³ However, in examining the articles as they interact, it becomes apparent that, at present, there can be no separation in practice.

a. *Conflicts Between the Legislature and the Executive*

While the Legislative Council is responsible for enacting laws,²⁷⁴ all laws passed by the Legislature must ultimately be approved by the Chief Executive.²⁷⁵ If the Chief Executive must answer to the Central People's Government, there is effectively no distinction between the Executive and the Legislature. This assertion is particularly true here, because the Chief Executive can dissolve the Legislature once per term for a number of wide-ranging reasons.²⁷⁶ Alternatively, the Legislature only has the power to impeach, not remove, the Chief Executive, and cannot prevent its own dissolution.²⁷⁷ This structure creates an awkward inequity because the executive branch has power over the legislative branch. This lack of separation does not comport with Hong Kong's present civil system, which Basic Law purports to preserve.²⁷⁸

Even if the Chief Executive fails to function within his obligation to the Central People's Government, or is forced to approve a bill the legislature passes the second time, each

272. See discussion *infra* part V.

273. See *supra* parts II.C, II.D.

274. See *supra* text accompanying note 82.

275. See *supra* text accompanying note 84.

276. See *supra* text accompanying note 79.

277. See *supra* text accompanying note 83.

278. See *supra* text accompanying note 66.

new law, once enacted, must be sent to Beijing for review by the SCNPC.²⁷⁹ Then, only if the subject matter falls solely under the jurisdiction of Hong Kong, will the law remain a law.²⁸⁰ China may arbitrarily decide that a new law contravenes Basic Law and simply repeal it.²⁸¹ Giving China this ultimate veto power effectively renders Hong Kong SAR's legislature powerless. This situation hardly gives Hong Kong SAR an autonomous existence.

China specifically reserves this scrutiny with respect to foreign affairs, which can invariably cause problems for foreign investment and trade laws promulgated by the Legislature.²⁸² Again, the line between the Executive and the Legislature becomes more and more blurred. Either way, China's executive body, the SCNPC, or Hong Kong's executive body, the Chief Executive, has final say over the acts of the Legislature.

b. *Conflicts Between the Judiciary and the Executive*

A separation of powers problem also exists between the judicial and executive branches. Two limitations on judicial power exist. First, the final power of interpretation lies in the SCNPC, which is an executive body.²⁸³ Thus, regardless of what the judiciary rules, the SCNPC can potentially enter and interpret the law as it pleases. Hong Kong SAR will have no choice but to accept whatever the interpretation is.

Second, article 18 limits the power of Hong Kong SAR's legislature to adjudicate foreign affairs issues.²⁸⁴ Not only does the SCNPC have the sole power to bring any kind of foreign adjudication within its jurisdiction, it also has the sole power to determine what the term "foreign affairs" encompasses.²⁸⁵

Article 158 authorizes Hong Kong to refer to SCNPC for assistance in interpretation.²⁸⁶ Although Hong Kong SAR can ask for assistance, the SCNPC has the power to unilater-

279. See *supra* text accompanying note 87.

280. See *supra* text accompanying note 86.

281. BASIC LAW, *supra* note 14, art. 17.

282. *Id.*

283. *Id.*

284. See *supra* text accompanying note 53.

285. BASIC LAW, *supra* note 14, art. 13.

286. *Id.* art. 158.

ally decide what is within its scope.²⁸⁷ If the subject matter concerns affairs of the Central Government or the relationship between Hong Kong and China, Hong Kong must refer to the SCNPC for guidance. This provision is so broad that it can potentially encompass any matter.

Thus, although supposedly operating autonomously, when Hong Kong has problems interpreting conflicts and certain portions of Basic Law, these difficulties will force the SCNPC to take a more active role in Hong Kong's government. The SCNPC will therefore become more important in the relationship between Hong Kong and China, again diminishing Hong Kong SAR's independence.

Another difficulty is the uncertainty of whether, and when, the SCNPC will choose to challenge a law. This prospect could cause Hong Kong SAR laws to lose their determinative nature, resulting in confusion in Hong Kong SAR. This also creates a situation where a citizen could potentially challenge a law by bringing it before the SCNPC, delaying its enactment while the SCNPC makes its determination. This would hamper the effectiveness of the Legislature.

Even more difficulties arise given the lack of precedential value of judicial decisions.²⁸⁸ A system is therefore created whereby the interpretation of written laws can change with the will and visions of party leaders based on what they believe to be the present party policy. This problem seriously hampers China's ability to build a strong framework within which United States businesses can operate. Indeed, a market system can only exist "within a [framework] of laws relating to property, contract and tort, and in an environment of the rule of law."²⁸⁹

If these conflicts between the Basic Law and the Chinese Constitution cannot be resolved before 1997, it will be unclear what the law of Hong Kong actually is. The power of the SCNPC may actually *create* consistency between Basic Law and the Constitution, but this consistency will be at the will of the Chinese Government.

287. *Id.* art. 13.

288. See *supra* text accompanying notes 149-50.

289. Carver, *supra* note 111, at 27.

2. *The Influence of Politics on China's Governmental Structure*

It is possible that the idea of a checks and balances system between the executive and judiciary, or between the executive and the legislature, could work, as it does in many countries. However, China's executive branch is not just another branch of government. Although the current Chinese Constitution contains no specific references to how the Communist Party should function in each branch of government,²⁹⁰ the Preamble mandates that the Communist Party will guide China's leadership.²⁹¹ Thus, the world must rely on the expectation that Communist Party policies essentially run the Chinese Government.

If this is true, then the SCNPC and NPC are instruments of the Party, making the Chief Executive of Hong Kong, who is responsible to those bodies, responsible to the ideologies of the Communist Party as well. In effect, Hong Kong cannot ever achieve or maintain any real independence in its government. Possibly, China's desire to retain control may become more important than maintaining economic stability in Hong Kong SAR.

Indeed, there seems to be evidence in Basic Law of China's desire to maintain the strength of the Communist Party. First, if China were as democratic as its Constitution purports it to be, Basic Law would not be so concerned with curbing Hong Kong SAR's powers, when Hong Kong's success is based on laissez faire economic policies.²⁹² Any limitations China places on Hong Kong SAR's independence are ironic, considering that China's chief reasons for resuming sovereign power over Hong Kong are Hong Kong's economic power and potential for further growth. Through Hong Kong, China wishes to extend such growth to itself. Hong Kong's success in world trade and investment are due to the principles upon which its government is based.

290. *Id.*

291. P.R.C. CONST. pmbl. Deng Xiaoping reaffirmed this commitment at the Eighth National People's Congress, on March 15, 1993, by stating that "[t]he core task of economic construction [of] Communist Party Leadership [is to] preserve unity and stability. Over the next five years we have to make a great step forward towards the establishment of a *socialist market economy system*." Carver, *supra* note 111, at 4.

292. See *supra* text accompanying note 1.

Second, a stipulation in the Joint Declaration and in Basic Law provides for only a fifty year guarantee of autonomy.²⁹³ If China really intended Hong Kong SAR to continue functioning as a capitalist economy, it would not impose any time limitation within which the Joint Declaration and Basic Law would remain valid. These facts point toward the possibility that China does not intend to dispose of its socialist policies.

Finally, the Joint Declaration provides for a "high degree of autonomy" rather than "autonomy."²⁹⁴ While it is expected that China would not want to give up complete control, this phrasing leaves open the possibility that China can measure autonomy in any manner it wishes. Thus, true independence is not an option for Hong Kong unless the Communist Party releases its hold on governmental bodies.²⁹⁵

Even China acknowledges the conflict between Party policy and Hong Kong's free market economy.²⁹⁶ Officials admitted that the transition is "fraught with uncertainty," and that it is "inevitable that [China will] fail to manage some things appropriately and well."²⁹⁷ In a statement before the Party Committee Meeting in Beijing on March 13, Party Officials stated that they would "govern Hong Kong in the same manner."²⁹⁸ This language strengthens the argument that Party policy cannot be completely uninfluential in the governing of Hong Kong. If it were truly likely that Party policy would not

293. Joint Declaration, *supra* note 4, pmbl.

294. BASIC LAW, *supra* note 14, art. II.

295. See discussion *infra* part V. This situation can be likened to the current situation with established Special Economic Zones [hereinafter SEZs] in China. China has given the SEZs special provincial power within which to promulgate and interpret laws which further their economic growth. P.R.C. CONST. arts. 116-118. However, it continues to reserve for the Central Government the power to determine whether a contradiction occurs between that SEZs' law and the P.R.C. Constitution. *Id.* Where it is determined that conflicts occur, the SCNPC determines the legitimacy and interpretation of that law. *Id.* Such a reservation of power gives the SEZs "no authority to enact laws necessary for economic reforms." Carver, *supra* note 111, at 30. This situation is similar to Hong Kong's, and thus a similar outcome could occur.

296. China: Li Ruihuam Admits "Many Issues and Many Difficulties" on Hong Kong Issue, BBC Monitoring Service: Far East, Mar. 16, 1995, available in LEXIS, Asiapc Library, Curnws File.

297. *Id.*

298. *Id.*

interfere, then Party officials would discuss the governing of Hong Kong as within their realm of power.²⁹⁹

3. *International Rights and Obligations*

Another area of concern is what will happen to bilateral and multilateral treaties that the British entered into prior to 1997. Either these treaties must be renegotiated with Hong Kong under the Basic Law, or they must be honored as they stand. The United States has opted to treat these obligations as containing the same rights and obligations as when the agreements were originally negotiated and signed.³⁰⁰ It is unclear whether China will allow these rights and obligations to stand if they feel the provisions contravene Basic Law or fall under the foreign affairs limitation on Hong Kong SAR's autonomy.³⁰¹

B. *The Likelihood of China's Adherence³⁰² to Joint Declaration and Basic Law Provisions*

Projections of China's likely adherence to the Joint Declaration and Basic Law range from the optimistic to the pessimistic. While China does hold a huge stake in adhering to the provisions of the Joint Declaration, because of its desire

299. Indeed, the continuing emphasis of the Party's role pervades even the most economically growing states in China. Shanghai aims to become the "international and financial business center of the western Pacific," and it is currently China's manufacturing center, with billions of dollars in foreign investment continuing to flow into it. Joyce Barnathan, *Asia's Supercities*, BUS. WK., May 1, 1995, at 151. Shanghai is also home to China's largest stock market. *Id.* Yet despite this growth, "Shanghai remains a tightly controlled, Communist-run city where free-market forces remain shackled by the state and where the party bureaucrats in Beijing ultimately pull the strings." Keith B. Richburg, *Shanghai or Hong Kong: Which Will Be China's Financial King*, INT'L HERALD TRIB., Aug. 26, 1995, available in LEXIS, Asiapc Library, Curnws File. The Party's stronghold on Shanghai is yet another indication that despite certain regions' success, China has difficulty realizing that Party policy can stagnate continued growth of the country.

300. See discussion *supra* part II.F.

301. See *supra* part IV.A.1.

302. Adherence is a wholly subjective term in this situation. As discussed below in part IV.C, China's view of adherence to the principles of Basic Law may be seen as interference by Hong Kong SAR and the rest of the world. For example, if China asserts its power to resolve a trade negotiation, it may characterize it as foreign affairs, which would make it appropriately within its power under article 13. BASIC LAW, *supra* note 14, art. 13. However, Hong Kong SAR may take the view that trade negotiations are purely within its own power under article 151. *Id.* art. 151.

to capitalize on Hong Kong's economic prowess,³⁰³ there are many factors to take into account in making such a projection.

1. *Legally Binding Nature of the Joint Declaration*

The Joint Declaration is a serious political compromise for China, since China has always felt that Hong Kong belonged to it anyway. China is probably aware, however, that the way it handles Hong Kong during the transition will be watched by the whole world. Although there are no clear means of enforcement, China does not enter into treaties lightly. Nevertheless, China has a spotty record of enforcing treaties into which it does enter.³⁰⁴ There is already practical evidence of China's unwillingness to allow Hong Kong SAR the autonomy expressed under Basic Law.³⁰⁵

On the other hand, it also seems clear that the Joint Declaration contains no provision for consequences of breaching the agreement. The Joint Declaration is a bilateral treaty between Great Britain and China, but in effect Britain has no further stake in Hong Kong's sovereignty. If no consequences exist, there is a disincentive for China to follow the Joint Declaration.

Already, China is balking at reaching agreements on many key issues related to the transition.³⁰⁶ One example of this was China's threat to abolish the Court of Final Appeal, based on British and American pressure to establish it.³⁰⁷ Great Britain wanted to establish the court before 1997 in order to alleviate investors' fears that their concerns will not be adjudicated by Hong Kong law.³⁰⁸ Because China consistently insists on doing things at its own pace, progress has

303. Hong Kong's Gross National Product was 20 times more than China's, although China's population is 180 times greater than Hong Kong's. HONG KONG: A CHINESE AND INTERNATIONAL CONCERN, *supra* note 44, at 96. The economic benefits for adherence are clearly significant.

304. *Contra* MIRON MUSHKAT, THE ECONOMIC FUTURE OF HONG KONG 75 (1990); MOSER, *supra* note 217, at 509.

305. In 1991, China tried to block the construction of a new airport on Lantau Island. *Weighing Hong Kong's Future*, *supra* note 16, at 31. Then, it sharply criticized the construction of a bridge to the airport, because the contractor was British. *Id.* China said it would have chosen the South Korean company Hyundai, even though its bid was 34% higher than the British bid. *Id.*

306. *See supra* text accompanying note 250.

307. *See supra* text accompanying note 248.

308. Gittings, *supra* note 99, at 1.

been slow. Based on this issue and many others, the relationship between Great Britain and China has grown acrimonious.³⁰⁹ In fact, China has even stated that Great Britain's push to establish the Court of Final Appeal is in "breach of the Joint Declaration."³¹⁰ This reaction fosters the concern that China can unilaterally decide that a law or policy is in conflict with the Joint Declaration, and, via the SCNPC, abolish it.

2. *Link Between Hong Kong's Economic Health and China's Continued Economic Growth*

Hong Kong's links with the rest of the world are another motivating factor in China's desire to allow Hong Kong SAR to maintain its independence. Hong Kong has been characterized as a "model of free trade."³¹¹ In fact, 1992 reports showed that Hong Kong's export share totaled approximately \$98 billion.³¹² This figure demonstrates Hong Kong's "important position in world trade and by doing so illustrates its value to China itself Anything that enhances and reinforces [the] key value of [Hong Kong] to China in its economic relations with the rest of the world has to be helpful in ensuring the territory's future."³¹³ In fact, China admits its need for investment in order to make the transition from a socialist to free market economy.³¹⁴ Hong Kong already contrib-

309. *Id.*

310. Lok Wong, *Hong Kong: Appeal Court Future 'Hangs on Agreement'*, S. CHINA MORNING POST, Apr. 6, 1995, available in LEXIS, Asiapc Library, Schina File.

311. Ian K. Perkin, *Study Ranks HK as a Model of Free Trade*, INT'L HERALD TRIB., Aug. 10, 1992, available in LEXIS, Asiapc Library, Curnws File. The article discusses a study done by Japan's Ministry for International Trade and Industry. The assessment is that "Hong Kong [is a] model of free trade, and rarely employ[s] the kinds of policies or measures that could be regarded as unfair in the context of the GATT or other international agreements, except some problems in enforcing effective protection for intellectual property rights." *Id.*

312. HONG KONG: A CHINESE AND INTERNATIONAL CONCERN, *supra* note 44, at 174.

313. Ian Perkin, *HK's Climb in Export Table Reflects Greater China Role*, INT'L HERALD TRIB., Mar. 30, 1992, available in LEXIS, Asiapc Library, Curnws File. See also Kevin Murphy, *Hong Kong Remains a Target for U.S. Funds*, INT'L HERALD TRIB., Sept. 25, 1992, available in LEXIS, Asiapc Library, Curnws File (comparing U.S. investment in Hong Kong which totaled \$6.43 billion, and U.S. investment in Japan which totaled \$22 billion).

314. Duncan Hughes, *Completing the Jigsaw*, S. CHINA MORNING POST, Oct. 29, 1994, available in LEXIS, Asiapc Library, Schina File. For instance, Beijing

utes heavily to the financing of China's economic expansion.³¹⁵

In addition to China's need to keep Hong Kong safe in order to advance foreign investment interests, China has other interests in maintaining Hong Kong's status.

One interest is utilizing Hong Kong as a link to other ports with which China has a strained relationship,³¹⁶ such as Malaysia, the Philippines, and, most significantly, Taiwan.³¹⁷ China also relies on Hong Kong as a source for professionals and a way to limit contact between countries whose political ideologies are incompatible with China's. Additionally, China depends on Hong Kong for information on technological improvement and for access to those technologies. Thus, a significant value can be placed on Hong Kong's standing as a neutral trade link between China and other countries.³¹⁸

As China continues to open its ports to direct trade, however, its dependence on Hong Kong could potentially diminish. Conversely, Hong Kong depends heavily on China for everyday supplies,³¹⁹ and it relies on China as an export market, since Hong Kong's own market is limited by population size.

While China may not yet be willing to completely move into a free market economy, it certainly recognizes the necessity of maintaining Hong Kong as a free market in order to maintain Hong Kong's economic success. This realization, combined with the knowledge that Hong Kong's economic, political, and social health effects China's ability to grow eco-

has indicated that it will need well over \$400 billion in the next 10 to 15 years to rebuild and repair infrastructure. *Id.*

315. Caspar Weinberger, *Commentary; On Evenly at Home and Abroad*, *FORBES*, Jan. 2, 1995, at 33. Hong Kong has played an especially important part in financing south China's development. *Id.* China also needs Hong Kong for its expertise in how to raise and manage the capital necessary for China's expansion. *Id.*

316. KELLY, *supra* note 5, at 103.

317. *Id.* See discussion *infra* part IV.B.3. Trade between China and Taiwan via Hong Kong totals \$1 billion annually. JULIAN WEISS, *THE ASIAN CENTURY* 172-73 (1989).

318. Hong Kong remains the preferred location for Western corporations looking to coordinate Chinese business. Barnathan, *supra* note 299, at 154.

319. KELLY, *supra* note 5, at 103.

nomically, will heavily influence China's policymaking regarding the "one country-two systems" framework.³²⁰

One example of China's reliance on Hong Kong for its well-being is the enormous amount of Chinese investment in Hong Kong, and vice versa.³²¹ If China were to breach the terms of the Joint Declaration or Basic Law by asserting too much control with respect to trade, it would seriously jeopardize or freeze the foreign investment upon which both countries rely heavily for their prosperity.³²²

China's status regarding its GATT membership may be affected by its adherence to the Joint Declaration. If China does not show its ability to comply with the treaties it signs, that could potentially slow or halt its application.

3. *Taiwan Reunification*

China also has an interest in keeping Hong Kong in the "one country-two system" operative because of its goal to reunify with Taiwan.³²³ Taiwan is keeping a close watch on China as 1997 grows closer.³²⁴ It has already noted China's

320. For example, most of China's exports flow through Hong Kong's ports, so it is important that China not interfere with the functioning of these ports.

321. In 1992, Chinese investment in Hong Kong totaled \$13 billion. Jesus Sanchez, *International Business: Spotlight on Hong Kong; A Fading Crown Jewel?; Uncertainties Abound as Power Transfer Nears*, L.A. TIMES, Oct. 13, 1994, at D1. In addition, mainland Chinese have invested \$15-25 billion in Hong Kong. Richburg, *supra* note 299, at 1.

322. There is a correlation between Chinese moves and confidence in Hong Kong. See *supra* part IV.B.3. Currently, in a quest to find some security, about half of the 528 companies listed on the Hong Kong Stock Exchange have changed their legal place of business to Bermuda. Louis Kraar, *The Death of Hong Kong*, FORTUNE, June 26, 1995, at 1.

323. However, Taiwan is unlikely to return to rule under China at all. Although certain political forces in Taiwan are not opposed to reunification with China, most economists and politicians believe that Taiwan will refuse to seriously entertain this possibility. The reasoning behind this apprehension is that Taiwan fears economic stagnation at a time when the rest of the world is ready to invest heavily in the Pacific Rim. HONG KONG: A CHINESE AND INTERNATIONAL CONCERN, *supra* note 44, at 137. Taiwan continues to ally itself with American military power, especially in recent months, because it has observed China's increasing military activity off the Taiwanese coast. Patrick E. Tyler, *Risk of War Sharpens as Taiwan and China Spar*, INT'L HERALD TRIB., Aug. 24, 1995, available in LEXIS, Asiapc Library, Curnws File.

324. Maggie Farley, *Next Step; Taiwanese Worried over Hong Kong; China's Heavy-Handed Treatment of the British Colony Is Seen as a Warning Against Dreams of Unity*, L.A. TIMES, Nov. 15, 1994, at H2.

"increasingly heavy-handed" treatment of the territory with respect to economic issues.³²⁵

Taiwan publicly espouses the intention to reunify with China, but only on its own terms. It rejects the "one country-two systems" formula because it believes that Beijing will prevail in any dispute despite the safeguards built into the Joint Declaration and Basic Law.³²⁶ Taiwan also considers itself different from Hong Kong because Hong Kong is a colony and Taiwan is a sovereign state.³²⁷ It is therefore unclear to what degree the success or failure of the Hong Kong system will affect reunification efforts. Notwithstanding Taiwan's open rejection of the "one country-two systems" formula, it seems apparent that China's adherence to that system would help build confidence that China will do what it says it will.

China also has an incentive to maintain Hong Kong because Hong Kong serves as the "main conduit for Taiwan-China trade and investment flows."³²⁸ China has stated that Taiwanese trade will indeed be regulated by Hong Kong Law.³²⁹

If reunification occurs, the triad would create the world's second largest economy.³³⁰

4. *Resilience and Strength of Common Law System*

Common law is the primary source of law throughout the world and has not been effectively replaced by any other sys-

325. *Id.* Taiwan cites examples of economic interference including obstruction of Hong Kong's renewal of commercial air service agreements between Hong Kong and Taiwan, and an agreement which would have allowed Taiwanese investors to trade on the Hong Kong futures market. *Id.* The Taiwanese are bitter towards China because of its willingness to allow Taiwan to invest in China, while China perpetuates an acrimonious social relationship. *Id.* One example of the political interference Taiwan cites is when China attempted to halt the celebration of Taiwanese Founding Day in Hong Kong. *Id.* China was unsuccessful on that particular day, but the Taiwanese are not optimistic given that a later celebration was ultimately canceled by Hong Kong. *Id.*

326. Keith Richburg, *Hong Kong Formula Falls Flat in Taiwan*, INT'L HERALD TRIB., June 19, 1995, available in LEXIS, Asiapc Library, Curnws File.

327. *Id.*

328. Kevin Murphy, *Beijing Opts for the Status Quo on Hong Kong-Taiwan Ties*, INT'L HERALD TRIB., June 24, 1995, available in LEXIS, Asiapc Library, Curnws File.

329. *Id.*

330. Farley, *supra* note 324, at H2. The United States is number one. *Id.* Figures from 1993 put this output at about \$3.2 trillion. *Id.*

tem of law.³³¹ Hong Kong's judges and lawyers are educated under the common law system.³³² Because China depends on Hong Kong for development, it would want to preserve Hong Kong's educational system in order to solidify its own development and growth. Common law is also the source of law utilized and understood by many countries with which Hong Kong shares economic ties. This relationship is another primary reason for China's interest in resumption of sovereignty over Hong Kong.

C. *Problems with the Legal Consistency Between Basic Law and the Chinese Constitution*

Another fundamental conflict exists between Basic Law and the Chinese Constitution. While the Chinese Constitution provides for the establishment of special administrative regions, it does not specify that these SARs can run under capitalistic governments. Thus, since the preamble of the Chinese Constitution espouses a government run under Party leadership, and since Basic Law requires consistency with the Constitution, it seems that Hong Kong could possibly never be autonomous.

China could therefore amend its constitution in order to ensure that the Hong Kong capitalist system can exist notwithstanding the Constitutional provision for Party leadership.³³³ China, however, refuses to even discuss the possibility of amending its Constitution to provide for more specific guarantees.³³⁴ Without such an amendment, it is virtually assured that from the onset of Chinese control in 1997, any kind of reinterpretation of Hong Kong's present laws is possible.

331. Professor Peter Wesley-Smith, Address at the University of Hong Kong (June 21, 1994).

332. *Id.*

333. HUNGDAH CHIU, HONG KONG'S TRANSITION TO 1997: BACKGROUND, PROBLEMS AND PROSPECTS (WITH DOCUMENTS) 10 (1993). The Chinese Constitution provides for the establishment of special administrative regions "when necessary." P.R.C. CONST. ch. III, art. 31. Article 31 also indicates that the law of such regions will be enacted by the NPC "in light of specific conditions." CHIU, *supra*, at 9. The ambiguity of this provision gives the NPC a great deal of flexibility in creating law for such special regions.

334. CHIU, *supra* note 333, at 10.

D. *Hong Kong, China, and GATT*

One of the main problems involved in enforcing GATT rulings is the degree to which the rules are actually followed by the member countries.³³⁵ Compliance with GATT rulings is heavily influenced by the domestic rules operating within the member countries.³³⁶ Herein lies the problem with China and Hong Kong.

Because Hong Kong SAR and China have such enormous potential for, and likelihood of, conflicts with domestic policy,³³⁷ can Hong Kong hope to operate effectively as a member nation of WTO while operating under China's watchful eye? If one were to venture through the quagmire of legislative, judicial, executive, and political entanglements, one begins to see that American businesses could face dire consequences with respect to their investments in either country should China decide not to adhere to the Joint Declaration and Basic Law. China's relationship with GATT is therefore a crucial point which must be resolved.

1. *Hong Kong SAR as an Independent Member of GATT*

As discussed above, Hong Kong will remain a separate member of GATT as Hong Kong SAR.³³⁸ China will be at a considerable disadvantage if it chooses not to comply with the Joint Declaration by not allowing Hong Kong SAR to operate as an SAR and as an independent member nation of GATT.³³⁹ The reality of this assertion can be seen with respect to Hong Kong's links with the rest of the world.³⁴⁰ However, the consequences of noncompliance, while appearing to be both politically and economically driven, are in fact purely economically driven. Thus, the United States might have more to lose if it is forced to deal with China should China decide not grant Hong Kong the autonomy prescribed by the Joint Declaration and Basic Law.

335. PETERSMANN & HILF, *supra* note 164, at 37.

336. *Id.* at 38.

337. *See supra* part IV.A.

338. *See supra* text accompanying notes 169-70.

339. *See discussion supra* part II.E.2.

340. *See discussion supra* part IV.B.2.

2. *China's Need to Become a Member of GATT/WTO*

Why does China need GATT? Quite simply, as China's economy grows more export dominated, it needs wider access to foreign markets.

a. *What Can Happen if China Is Not Granted Membership?*

The United States has a great deal to lose if China does not become a member of GATT. It currently has approximately \$5 billion invested in Hong Kong,³⁴¹ and it is a party to more than eighty-five multilateral treaties and agreements with Hong Kong.³⁴² These statistics indicate that the United States cannot live without Hong Kong as a focal point for trade.

The United States' continued good relationship with China is essential in order to maintain a good relationship with Hong Kong and to ensure its own economic growth. A disappearing trade relationship with China could have grave consequences for the United States' economy. Indeed, one study showed that if the United States did not invest in China, "the Japanese, the French, the Germans and the Latin Americans would capture the Chinese markets within 24 months and [the United States] would probably lose those markets for the next decade or 20 years."³⁴³

The United States' refusal to support and facilitate China's membership in GATT could also cause China to take more control over Hong Kong's trade policies with the United States. China could choose to utilize the "foreign affairs" clause to make unfavorable decisions regarding agreements between Hong Kong SAR and the United States.³⁴⁴ This

341. HONG KONG: A CHINESE AND INTERNATIONAL CONCERN, *supra* note 44, at 186.

342. *Id.*

343. Robert Matsui, *The Price Tag for Advancing Human Rights*, RECORDER, Summer 1994, at 6. In fact, if the United States had cut off Most Favored Nation status to China in 1994, conservative estimates show that the United States would have lost 250,000 jobs in the first two months, and would have added \$15 billion to the cost of goods consumed by the low and middle income population of the United States. *Id.* To show the absolute necessity of China's trade with the United States, it is worth mentioning that "the Chinese and Indonesians combined will need \$1 trillion worth of infrastructure over the next 10 years. That is equivalent to building 18 Santa Monica Freeways per day." *Id.* (emphasis added).

344. See *supra* text accompanying note 51.

could result in China's refusing to let Hong Kong adhere to a WTO ruling by asserting its power to regulate foreign affairs, declaring the judgment in contravention of Basic Law, and leaving American businesses powerless and without a remedy on the world trading market.

China believes that its inability to gain GATT membership will "not affect economic cooperation with other countries or development of foreign trade."³⁴⁵ However, current United States-China trade disputes could affect Chinese policy towards Hong Kong SAR indirectly. China could make business dealings between Hong Kong SAR and United States difficult if it felt that the United States was unduly keeping it from entering GATT. It is therefore even more imperative that the United States facilitate China's entry into GATT.

b. *What Would Happen if China Is Granted GATT Membership?*³⁴⁶

Granting GATT membership would facilitate access for United States businesses to China and would ease the relationship between the United States and Hong Kong SAR. Not only would market access be available, but so too would the dispute settlement mechanism of the WTO. Presently, China is not bound by any kind of international treaty to follow judicial decisions of an international body.

3. *Would China Adhere to GATT?*

a. *Dispute Settlement*

Since China needs GATT, it is likely to make a good effort to adhere to GATT principles. It could, however, assert in the face of challenges by member countries that the WTO has no actual power to adjudicate a dispute or enforce a settlement. This has always been a problem with GATT. Again, that is why it is important to examine a country's domestic law and enforcement policies in assessing membership which essentially requires self-policing, as GATT does. "GATT law"

345. *China: WTO Setback Won't Hurt Trade*, ASIAN WALL STREET J. WKLY., Jan. 2, 1995, at A8.

346. It is estimated that GATT membership is worth approximately \$40 billion to China. *Hong Kong Officials Concerned over Growing U.S.-China Tensions*, Daily Report for Executives, Feb. 8, 1995, available in LEXIS, Legnew Library, Curnws File.

appears to have no constitutional source, as opposed to domestic law.³⁴⁷ This lack of derivation creates an atmosphere in which some countries may feel that GATT is an informal agreement.³⁴⁸ Given the heavy foreign investment in it, China could also potentially never be punished for breaking GATT rules, thus perpetuating nonenforcement problems.

GATT requires that member countries allow certain disputes to be adjudicated by its dispute settlement mechanisms.³⁴⁹ However, China currently refuses to even recognize the jurisdiction of the International Court in the Hague, the primary source of dispute settlement between countries.³⁵⁰ If this continues to be the case, the question remains whether China would recognize the jurisdiction of the newly created WTO mechanism for settlement of disputes.

b. *Transparency Requirement*

With China continuing to hold tight control over individual freedoms, it is difficult to ascertain the extent to which the transparency requirement will be fulfilled, even if a written set of laws obtains approval from the committee overseeing China's application for membership. Because GATT's transparency requirement seeks to make trade rules publicly available to all member countries, this goal may cause China to sway on the issue of transparency. Transparency for China is equivalent to a loss of control.

Civil and common law offers the "concept of a legal right as a legitimate demand for state enforcement of a legal rule."³⁵¹ By stark contrast, socialist systems have little use for legal rights, since they are based on control by political authority.³⁵² Since a socialist system has more interest on the underlying goal of the system than the preservation of an individual interest, the possibility of China's fulfilling an obligation to construct such a system, much less adhere to it,

347. *Id.*

348. *Id.* Prior to the creation of the WTO, GATT had no binding force. The present agreement provides that member nations recognize and adhere to judgments as part of each country's responsibility of membership. WTO Charter, *supra* note 177, art. II.

349. HONG KONG: A CHINESE AND INTERNATIONAL CONCERN, *supra* note 44, at 141.

350. *Id.*

351. Carver, *supra* note 214.

352. See *supra* part II.D.1.

seems to have staggering odds. However, given China's desire to join GATT, the transparency requirement may likely be fulfilled. The outcome of this requirement depends on where China decides to draw the line between the socialist and market aspects of its economy.

E. *Other Areas in Which China Can Affect the Operation of Hong Kong SAR*

1. *Continuing Clash of Socialist Regime and Capitalist Economy*

Dominating Chinese society are the conflicting ideas of achieving a capitalist system under an authoritative government.³⁵³ China wants to increase its business practices but continues to make restrictions on the social aspect of its society. These two ideas are completely incompatible.³⁵⁴ However, China continues to have difficulty seeing the contradiction between a liberal market and a rigid social system.³⁵⁵ "Official China still sees markets and private property as instruments to be used to invigorate sagging socialism, not as a desirable *alternative* institutionalized system."³⁵⁶

In fact, one can view China's failure to let go of its social politics in order to advance its economic system as continuing evidence of its inability to see that China is actually different from Hong Kong. Recognizing that China's planned economy differs from Hong Kong's free market is necessary before Chinese leaders can attempt to diminish the influence of party policy on economic policy. Indeed, China cannot see that Hong Kong "is a profit-making machine whose outstanding performance is the result of a very flexible posture in the face of highly volatile economic conditions."³⁵⁷ This flexibility is, again, totally incompatible with the rigid social structure that frames China's government.

353. Christopher Lingle & Kurt Wickman, *Is China Ready for GATT?*, *ASIAN WALL ST. J. WKLY.*, May 12, 1994.

354. *Id.*

355. *Weighing Hong Kong's Future*, *supra* note 16, at 85. This article asserts that "[w]hat does matter to [China] is that [its] path of economic development should not be diverted by the complications of democracy. Hence their obsessive concern with Hong Kong: it is both an economic model to be emulated and a political threat to be avoided." *Id.*

356. Carver, *supra* note 111, at 27 (emphasis added).

357. MUSHKAT, *supra* note 304, at 121.

2. *Special Problems Regarding International Business Transactions*

What makes international business transactions different from domestic business transactions is that a lawyer must not only look at the business objective, but also observe political forces which intervene and impact the transaction. Foreign politics have a strong influence on the nature of the business transaction and can often upset the fluidity of that transaction. One must be careful to not only observe the changes in laws and regulations in the United States, but also the laws and regulations in the foreign country with which one deals.³⁵⁸

3. *Instability of Future Leadership as Deng Xiaoping's Health Declines*³⁵⁹

Another factor that affects the climate of China-Hong Kong relations and American business is the impending death of Deng Xiaoping. Deng is the ninety-one-year-old leader who holds no official position in China, yet is credited with the transformation of the country towards a free market economy.³⁶⁰ Reports indicate that "uncertainty surrounding Deng's health is serving to paralyze the economy."³⁶¹

What will happen upon Deng's death? President Jiang Zemin and Premier Li Peng³⁶² are slated to succeed Deng and continue China's path to economic reform. In fact, the current succession structure, set up by Deng, is as follows: Jiang in place of Deng, Li Peng leading the government, and Zhu

358. OSCAR SCHACHTER & ROBERT HELLAWELL, COMPETITION IN INTERNATIONAL BUSINESS 13 (1981).

359. See discussion *supra* part IV.A.2.

360. James Pringle, *China Holds Its Breath in Death-Watch*, S.F. EXAMINER, Jan. 14, 1995, at A3. Deng Xiaoping "has been the chief architect of the country's economic reform over the past 16 years and has provided the glue to hold together different tendencies within the Communist Party while pursuing continued economic expansion combined with rigorous political control." *Id.* See also Barry Naughton, *Deng Xiaoping: The Economist*, CHINA Q., Sept. 1993, at 491 (discussing Deng's historical contributions to China's rapid economic growth and China's economic policy under his leadership).

361. Pringle, *supra* note 360, at A3.

362. Li Peng was the leader who instigated the suppression of the showing of democracy in Tiananmen Square in 1989. Rone Tempest, *Deng Death Watch Rivets China*, S.F. EXAMINER, Feb. 5, 1995, at A12. This quelching of free speech seems to indicate that China is still desperately afraid of losing control of its people. *Id.* Li Peng is also the leader of the Party's hard-line faction. *Id.*

Rongji heading the economy.³⁶³ Further, Deng has put in place his own appointees in the military to support Jiang's succession.³⁶⁴ Jiang, Li, and Zhu comprise the conservative hard-line rapid growth policy implemented by Deng.³⁶⁵ However, a power struggle seems likely because, as one Western military observer stated, "Jiang is seen a lot like Bill Clinton. He's obeyed because he's commander in chief, but there's not a lot of respect."³⁶⁶ In addition, the rapidly changing economy, the move towards a free market economy, and the pending cession of Hong Kong make a power struggle between socialist and capitalist figures likely because the transfer of political power is not institutionalized.³⁶⁷ This power struggle could seriously damage American interests in both Hong Kong and China.³⁶⁸ Whoever succeeds Deng must continue on China's path of economic reform so that investors can rely on at least a status quo of Chinese law. Continuing to do so will stabilize confidence in Hong Kong's markets and will allow foreign investment to continue on the same path.³⁶⁹

The inability of Deng's successors to stay in power could interfere with Hong Kong's "one country-two systems" arrangement created by Deng. Confidence in China's smooth succession is strongly tied to confidence that Hong Kong can remain autonomous.³⁷⁰

363. Joyce Barnathan et al., *China After Deng*, BUS. WK., Feb. 6, 1995, at 52.

364. *Id.*

365. *Id.*

366. *Id.* For a more complete analysis regarding various leaders who are likely to vie for power once Deng passes, see *id.*

367. Lok Wong, *China; Analysts Consider Aftermath of Chen's Death*, S. CHINA MORNING POST, Apr. 17, 1995, available in LEXIS, Asiapc Library, Schina File.

368. In addition to this struggle between Jiang Zemin and Li Peng, there is also the possibility that the entire power struggle could involve Zhu Rongji, the head of economic reform, and Qiao Shi, the current leader of the NPC. Moffett, *supra* note 119, at A6.

369. Deng's pending death and the instability of successive power have already cost China some foreign investment. Because of the string of permits and levels of approval foreign investors must endure to participate in China's growth, indecisiveness and uneasiness have created a lack of confidence that permission will be secured following Deng's death. The holdups are also probably a result of Deng's lack of leadership due to his illness and already signal the potential for problems.

370. Deng has always "intervened and argued for a more strategic cooperation with the United States as integral to the long term development of the economy." Keith Richburg, *At 91, Deng Still Casts a Political Shadow, Potential Challengers for Leadership Wait Quietly in Wings*, INT'L HERALD TRIB., Aug. 23, 1995, available in LEXIS, Asiapc Library, Curnws File. Again, any changes

4. Cultural Differences

Communication between Chinese and American businessmen is often difficult because of different cultural norms.³⁷¹ For example, in the United States the common approach of addressing a difficulty "head-on" often leads to the Chinese businessmen "losing face," which hampers resolution of business conflicts. Another problem is the language barrier. Still another pervasive problem is China's slow undertaking of formal business procedures such as holding weekly meetings, instituting budgets and progress guidelines, and clarifying officers' duties.³⁷² Chinese businessmen tend to emphasize sustaining relationships whereas American businessmen immediately want to reach agreement on the terms of business dealings.³⁷³

Another important difference has to do with the legal systems in place. China views contractual disagreements as cultural matters, which means that they are resolved through "friendly discussions."³⁷⁴ In the United States, law is an ally to right wrongs, whereas in Asia the view is that one has not met the "standard of trying to maintain harmony" if the dispute is taken to court.³⁷⁵ In Asia, the last step one takes is threatening or filing a lawsuit.³⁷⁶

This also means that because contracts are rarely adjudicated in the courtroom, and because legal decisions carry no precedential value, contracts are essentially formally unenforceable through the Chinese legal system.³⁷⁷ This scenario

in attitude towards the United States could affect Hong Kong's policy towards the United States following cession in 1997.

371. Jill Ireland, *Finding the Right Management Approach*, CHINA BUS. REV., Jan.-Feb. 1991, at 14.

372. *Id.* at 15.

373. *See id.*

The American way [of doing business] is, "Hey, it's costing us \$5,000 to \$6,000 to send you on this trip, you'd better get the business." The Asian idea is, "We're 2,000 years old, and we want to build a relationship and learn all about you and all about your facilities."

CHRISTOPHER ENGHOLM, DOING BUSINESS IN ASIA'S BOOMING "CHINA TRIANGLE" 70 (1994).

374. John J. Hampton, *China: Managing Risks in Chinese Joint Ventures*, RISK MGMT., Apr. 19, 1991, available in LEXIS, Asiapc Library, Allasi File.

375. Larry L. Greewald, *Resolution in Asia*, ASIA L. & PRAC., Nov. 26, 1994, at 4-5.

376. *Id.*

377. An example of this is China's recent decision to default on a 20 year lease with McDonald's regarding its Beijing cite. Sarah McAdams, *It Is Not*

makes entering contracts very precarious for foreign investors.

F. *Special Problems for the Small/Individual Investor*

So far, this comment has focused on the world market, and has been somewhat generally geared towards the problems of the United States as a whole. However, it is worth examining what might happen to small or individual traders or investors.

Small investors face different problems on the world market. Because each move made has an immediate economic consequence, it is crucial that they are able to plan according to a consistent set of rules. As has been shown above, that has been problematic for China in the past, and may be in the future given the inconsistencies between Basic Law and the Chinese Constitution.³⁷⁸

In addition, the length of time it takes for businesses to be granted status to do business in China hits small businesses disproportionately hard, because they generally have insufficient or significantly fewer resources to expedite the process. Moreover, most GATT trade disputes are brought by the United States on behalf of large businesses or industries, where the government chooses or is compelled to intervene on their behalf.³⁷⁹ Thus, often there is no remedy for the small investor when disputes occur.

Business as Usual for Lawyers in China; Legal Restrictions Are Yet Another Barrier to U.S. Companies, CORP. LEGAL TIMES, Jan. 1995, at 11. Despite its protests, McDonald's had no choice but to close the restaurant in the face of China's decision that the development of a \$1.2 billion commercial, office, and residential complex on that particular property was a better economic decision for China. *Id.*

378. See *supra* parts IV.A, IV.E.

379. Large investors were in fact a main reason President Clinton chose to renew China's MFN status.

Even if [President Clinton] had wanted to [deny renewal of MFN status], Congress would probably not have let him do so. For many lawmakers had been listening to what the President had to say. So had the American Chamber of Commerce. So had the U.S.-China Business Council, Boeing, AT&T, K-Mart, and millions of Americans who invested money in mutual funds that were buying up stocks in Shanghai and Hong Kong by the billions.

Thomas L. Friedman, *Economy Wins over Rights as Clinton Eats a Little Crow*, INT'L HERALD TRIB., May 28, 1994 (emphasis added), available in LEXIS, Asiapc Library, Curnws File. Smaller investors do not have the same voice or economic power as larger investors.

Lastly, corruption is a continuing problem in the Chinese economy, currently adding five to ten percent to the cost of doing business with China.³⁸⁰ If this extends into Hong Kong in 1997, then small businesses and start-up ventures will suffer. They will likely be unable to pay those added costs to protect their interests and their growth will be stymied, if not halted. The pervasiveness of corruption in Hong Kong could be a great contributor to the downturn of Hong Kong courts as arbitrators of disputes and crimes, thus eliminating their legitimacy. The effect of this will be to create a path towards Hong Kong's decline as a favorable place to do business.

V. PROPOSALS

The remainder of this comment offers possible solutions to the larger problems elicited above.

First, it is necessary to make some basic assumptions upon which to base these proposals. The first assumption is that Hong Kong should continue to remain a capitalist economy. Second, one must realize that these proposals are not entirely legally based. The proposed solutions are legal solutions, but in this instance the United States only has leverage, not legal power, to impose any of these proposals. Therefore, while the effect of these proposals are legal, they are policy oriented and rely on the interactions between Hong Kong, China, and the United States with respect to economic, not legal, power. This comment suggests that the United States emphasize its position as the head of the committee overseeing China's WTO membership application. Pressure exerted under such conditions would then be viewed in the context that China does not have support for WTO membership, thus making it economically weaker. Perhaps then China will make reasonable efforts to resolve conflicts in the transition.

A. *Increase United States Pressure on Hong Kong to Make Demands Now Rather than Waiting Until 1997*

While the United States invariably needs China because of its immense new market, the United States still has a great deal of leverage. Showing support for the maintenance

380. Maggie Farley, *China Makes Itself at Home in Hong Kong*, L.A. TIMES, May 2, 1995, at H1.

of Hong Kong as an SAR would likely strengthen Hong Kong's bargaining position with respect to transition rules currently being negotiated. There are several areas in which the United States should direct its influence.

1. *Separation of Powers*

Basic Law needs to be amended to provide for a more independent Hong Kong SAR. This can be accomplished without China diminishing its sovereign power over Hong Kong, by simply providing that the Chief Executive of Hong Kong not be an officer appointed by China. Detaching the highest executive officer of Hong Kong from the executive body of China would add to the confidence that China desires to maintain Hong Kong's status quo. This detachment would also give the appearance of removing the Party influence on Hong Kong SAR. In addition, it could have the effect of making China treat Hong Kong as an autonomous country. This move might enhance the chances of achieving the high degree of autonomy prescribed in the Joint Declaration.

The United States could assist in this venture by also urging China to consider that detaching the Chief Executive from the NPC would not diminish the role of the NPC in practice. That is, if China continued to reserve the power vested in NPC for final determination of whether enacted laws or negotiated treaties were consistent with Basic Law, it would effectively have the same power. Separating the powers would be an important step because it would show that China was moving towards easing bureaucratic control.

The best way for China to demonstrate that it intends to preserve Hong Kong as it is would be to allow the Chief Executive to be directly elected by the people of Hong Kong SAR. Democratic elections are one of the key structures in capitalistic economies. If Hong Kong could institute direct election of the Chief Executive, this move could potentially insulate Hong Kong SAR from the more informal and arbitrary Chinese Government. In addition, it could aid Hong Kong in retaining many people who might leave, based on their feeling that they no longer have a say in the direction their country is going.

2. *Pressure Hong Kong to Ask that Specific Provisions of Basic Law and the Joint Declaration Be Integrated into a Constitution to Create a Better Source of Law*

If Hong Kong were able to retain its capitalistic characteristics by incorporating most of the essential points into a constitutional guarantee, there would likely be more confidence in Hong Kong's future. China might even be less likely to interfere with such a source of law, with the whole world watching.

The problem with this proposal, of course, is China's likelihood of allowing it to occur. However, since many of the economic demands that this comment proposes are also GATT demands, pressure to implement them could be successful. For instance, issues such as continued convertibility of currency, land ownership interests, and equal treatment of foreign and domestic investment, if constitutionally based, would serve to provide a more grounded source of law. The result of this would be to reduce the possibility that China could operate under its own interests and subvert these key factors in free trade.

3. *Pressure Hong Kong to Issue Its Own Policy Regarding the Status of International Treaties Entered into Prior to 1997*

Because much of the United States' concern lies in whether or not treaties will be honored past 1997, it would be beneficial for the United States to pressure Hong Kong to issue a policy regarding how it plans to honor or renegotiate those treaties. Indeed, the United States issued its own policy act regarding American treatment of bilateral and multilateral treaties between it and Hong Kong.³⁸¹

If Hong Kong issued its own statement that it would similarly honor the treaties and agreements entered into prior to 1997, such a statement would force China to answer questions regarding its intention to interfere with such matters. This would allow United States businesses to at least get a better idea of the direction China will take in 1997. It would also facilitate planning regarding not only how to do business in Hong Kong or China, but whether to do so at all. The for-

381. See *supra* part II.F.

mer option would be especially valuable for smaller investors who face more dire economic circumstances should their businesses fail under a hostile political climate.³⁸²

4. *Pressure Hong Kong to Amend the Chinese Constitution to Provide for the Functioning of a Capitalistic Economy Under the Sovereignty of a Socialist Government*

To assure the continued existence of Hong Kong as an SAR, the United States could pressure Hong Kong into demanding the amendment of article 31 of the Chinese Constitution to provide for the functioning of a capitalist economy as a special administrative region. This clause would give the world further assurance that economic interests will not be subverted in the face of political controversies on the mainland.³⁸³

5. *Pressure Hong Kong to State a Policy Regarding Party Presence in Hong Kong After 1997*

Because the Communist Party is a totally pervasive presence in China, it is important for Hong Kong to understand exactly what role China will play in Hong Kong. The influence of the Party in all branches of Chinese Government is likely to affect Hong Kong's ability to rule itself. One key question is whether the Chief Executive³⁸⁴ will be a Party member with real power granted to him to make the decisions required under Basic Law, or whether he will need to defer to the party for final decision-making power. In addition, will other officials appointed to assist Hong Kong in its transition be Party figures? To what extent will China ensure that officials appointed share Party views? Exactly to what extent will such leaders be "required" to subscribe to Party policy?

Whatever presence China intends the Party to have, Hong Kong needs to be informed prior to 1997. If the decision-making power will be held by the Party, then the law will be what the Party says it is. This would bear heavily on Hong Kong's ability to maintain its current economic and social policy.

382. See *supra* part IV.F.

383. See *supra* part IV.C.

384. See *supra* part II.C.1.

B. *Pressure China to Defer to a Third Party for Purposes of Determining Consistency Between Hong Kong Law and Basic Law*

An amendment to Basic Law which provides for deference to a third party in order to determine consistency between Hong Kong law and Basic Law would ease the 1997 transition concerns the United States has. If there were a third-party panel, or if China would agree to subject itself to jurisdiction of an international court, the resulting confidence would definitely aid all concerned.

Not only would United States businesses become more inclined to invest with confidence, but there would also be little doubt that Hong Kong would have less of a problem retaining major investors who are tentative about 1997. If a third party adjudicated disputes, rather than the sovereign government, most subjectivity would disappear and the world's interests, and particularly Hong Kong's, would not be subverted by Chinese Communist Party interests.

This type of adjudication would also aid China because it would lead China down the path to capitalism and free trade. China would have less difficulty seeing Hong Kong's necessity to remain free from the boundaries of government in order to maintain its economic prosperity. Since Hong Kong's economic prosperity is China's economic prosperity, this would likely create a stronger union, rather than create a more tenuous one. Third-party adjudication would be a "win-win" situation for China, Hong Kong, and the United States.

C. *Pressure China to Maintain Hong Kong's Status Quo Via WTO Entry*

Because the United States wields considerable power with respect to China's entry into the WTO, it can pressure China to accept and adhere to the constraints of interdependence which are the pillars of WTO membership by using Hong Kong as a measure of its sincerity to do so. The United States could take a silent seat and watch to see whether China will adhere to the Joint Declaration, but it would be more beneficial to form a strategy of dealing with China that encourages its adherence to the Joint Declaration. Such pressure would also facilitate China's entrance into the WTO. In fact, it might even be more prudent to offer China incentives to comply with its promises regarding Hong Kong, con-

sidering the enormous interest the United States has in preserving Hong Kong and advancing China's growth. Incentives could include educating China on the reasons why Hong Kong is valuable. As China itself has conceded, "[I]f you don't understand something, you are unaware of what makes it valuable, and it will be difficult to keep it intact."³⁸⁵

The United States must also be prepared to formulate a strategy to deal with China's coastal regions, such as Shenzhen, in the event that China becomes fragmented, or the move toward economic growth continues to favor the more independent coastal regions.

VI. CONCLUSION

There has been vast speculation regarding Hong Kong's future as 1997 grows nearer. What effect will its cession to China have on international trade? Ultimately, no matter what preparation or speculation takes place, there is no way to approach 1997 without caution. The world must simply wait to see what will occur. Indeed, it has been said that

Hong Kong's fate will be determined by which proves more powerful: the advantages of being the principle business and financial entrepot between China and the rest of the world, or the damage done to the territory's sophisticated social and economic fabric by being combined with the coarser weave of China.³⁸⁶

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385. Kraar, *supra* note 322, at 118. Outside observers have maintained that "No one thinks the Chinese will decide to kill the goose, but there is considerable concern about whether they know what to do to keep it alive." David Zeeck, *China Saw Hong Kong in New Light After Tiananmen*, INT'L HERALD TRIB., Sept. 3, 1995, available in LEXIS, Asiapc Library, Curnws File.

386. *It's Already 1997 in Hong Kong*, ECONOMIST, Dec. 8, 1993, at 26.

